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1319 No. 3898

San Francisco Law Library.
United States

1319
Circuit Court of Appeals

For the Ninth Circuit.

GEORGE WILLS & SONS, LIMITED, a Corpora-
tion,

Plaintiff in Error,

vs.

WILLIAM R. LARZELERE and JOSEPH J.
SWEENEY, Copartners Doing Business Un-
der the Firm Name of LARZELERE,
SWEENEY COMPANY,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.

FILED
San Francisco Law Library.
NOV 15 1922
F. D. MONCKTON,
CLERK.

United States
Circuit Court of Appeals
For the Ninth Circuit.


GEORGE WILLS & SONS, LIMITED, a Corporation,
Plaintiff in Error,

vs.

WILLIAM R. LARZELERE and JOSEPH J.
SWEENEY, Copartners Doing Business Under the Firm Name of LARZELERE,
SWEENEY COMPANY,
Defendants in Error.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

ALFRED J. HARWOOD, Esq., Kohl Building,
San Francisco, Calif.,
Attorney for Plaintiff in Error.

CHARLES W. SLACK, Esq., and EDGAR T.
ZOOK, Esq., Alaska Commercial Building,
San Francisco, Calif.,
Attorneys for Defendants in Error.

In the Southern Division of the District Court of
the United States in and for the Northern
District of California, Second Division.

No. 16,090.

GEORGE WILLS & SONS, LIMITED, a Cor-
poration,

Plaintiff,

vs.

WILLIAM R. LARZELERE and JOSEPH J.
SWEENEY, Copartners Doing Business
Under the Firm Name of LARZELERE,
SWEENEY COMPANY,

Defendants.

Complaint.

Now comes George Wills & Sons, Limited, a
corporation, duly organized and existing under
and by virtue of the laws of the United Kingdom
of Great Britain and Ireland, and lawfully trans-

acting business in the State of California, and in the City and County of San Francisco in the Southern Division of the Northern District thereof, and complains of the defendants, William R. Larzelere and Joseph J. Sweeney, copartners doing business under the firm name of Larzelere, Sweeney Company, and for cause of action alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland; and at all of said times was lawfully transacting business in the City and County of San Francisco, in the Southern Division of the Northern District of California.

II.

That defendants are, and at all times herein mentioned were, copartners doing business under the firm name of Larzelere, Sweeney Company; that each of said defendants is, and at all times herein mentioned was, a citizen and resident of the State of California. [1*]

III.

That the amount in controversy in this suit exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000); that this suit is between citizens of the State of California and a citizen and subject of a foreign State,

*Page-number appearing at foot of page of original certified Transcript of Record.

viz., the United Kingdom of Great Britain and Ireland.

IV.

That on the 19th day of February, 1917, at the said City and County of San Francisco, the plaintiff and the defendants executed and entered into a contract in writing in the words and figures following, to wit:

“San Francisco, California, U. S. A.
Feb. 19, 1917.

Larzelere, Sweeney Co.,
San Francisco.

Dear Sirs:

We hereby confirm the sale to you, through Mr. M. J. O'Reilly, of

75 (Seventy-five) tons of 2240 lbs. Crated
Brown Australian Onions
at the price of 4 (four) cents U. S. Currency per pound, landed on the Dock, duty paid, San Francisco.

Shipment to be effected from Australia by steamer on the 10th of March, 1917.

Quality of the onions delivered to the steamer in Australia to be guaranteed and a Certificate for same will be provided.

The Onions to be paid for by you in Cash on arrival in San Francisco.

This contract is of course subject to the usual clause exempting us from claims of any nature,

through non-fulfillment caused by conditions, over which we have no control. [2]

Yours faithfully,
For GEORGE WILLS & SONS, LTD.

A. H. ANDERSON,
Manager.

Accepted:

LARZELERE SWEENEY CO."

V.

That on or about the 10th day of March, 1917, said 75 tons of crated brown Australian onions were shipped from Australia to San Francisco. That at the time of the delivery of said onions to the steamer in Australia said onions were of good quality and the said onions were then in good order and condition.

VI.

That on the 19th day of May, 1917, said 75 tons of crated brown Australian onions arrived in San Francisco, and thereupon plaintiff notified defendants of the arrival of the same; that plaintiff thereupon caused said onions to be landed on the dock and thereupon paid the duty thereon.

VII.

That on the 22d day of May, 1917, plaintiff offered in writing to deliver said onions to defendants upon payment of the purchase price thereof by defendants to plaintiff; that said offer in writing was delivered to defendants on the said 22d day of May, 1917, and was and is in words and figures following, to wit:

“San Francisco, May 22, 1917.

Larzelere Sweeney Company,
San Francisco, California.

Dear Sirs:

Referring to sale by us to you of 75 tons of 2240 lbs. crated Brown Australian Onions, as per our letter to you under date of February 19, 1917, and your written acceptance endorsed thereon: The property covered by this contract of sale has arrived in [3] San Francisco and is landed at the dock and duty is paid. We hereby offer to deliver to you the said property upon payment of the purchase price. We also offer to provide and deliver to you the certificate called for by said contract of sale.

Yours faithfully,
GEORGE WILLS & SONS, LTD.,
By A. H. ANDERSON,
Manager.”

VIII.

That defendants failed and refused to accept delivery of said onions; that defendants failed and refused to pay the purchase price thereof; that defendants never accepted delivery of said onions and never paid the purchase price thereof.

IX.

That thereafter, to wit, on or about the 26th day of May, 1917, plaintiff sold said 75 tons of brown Australian onions in the open market in San Francisco at the market price thereof; that plaintiff received as the purchase price at said sale the sum of Two Thousand Five Hundred and Seventy-

nine and 57/100 Dollars (\$2,579.57); that the expenses necessarily incurred by plaintiff in preparing said onions for sale amounted to the sum of Four Hundred and Six and 20/100 Dollars (\$406.20); that plaintiff paid as a commission to the broker who negotiated said sale for plaintiff a commission of one per cent (1%), which said commission amounted to the sum of Twenty-five and 79/100 Dollars (\$25.79); that said commission is the usual, customary and ordinary commission paid on such sales in the City and County of San Francisco; that said commission is the reasonable compensation of said broker for his services. That in order to effect said sale it was necessary to pay said commission to said broker. That after deducting the said expenses necessarily incurred by plaintiff in preparing said onions for sale and the said commission paid to said broker, plaintiff received as the net [4] proceeds of said sale the sum of Two Thousand One Hundred and Forty-seven and 57/100 Dollars (\$2,147.57). That by said contract set forth in paragraph IV of this complaint, the defendants agreed to pay to plaintiff the sum of Six Thousand Seven Hundred and Twenty Dollars (\$6,720.00) as the purchase price of said onions.

X.

That by reason of the said breach of said contract by defendants, plaintiff has been damaged in the sum of Four Thousand Five Hundred and Seventy-two and 43/100 Dollars (\$4,572.43); that prior to the commencement of this action plaintiff

demande of defendants that said defendants pay said sum of Four Thousand Five Hundred and Seventy-two and 43/100 Dollars (\$4,572.43) to plaintiff, but the defendants failed and refused to pay the same, or any part thereof; that defendants have not paid to plaintiff the said sum of Four Thousand Five Hundred and Seventy-two and 43/100 Dollars (\$4,572.43), or any part thereof.

WHEREFORE, plaintiff prays judgment against defendants for the sum of Four Thousand Five Hundred Seventy-two and 43/100 Dollars (\$4,572.43), together with interest thereon at the rate of seven per cent (7%) per annum, from the said 26th day of May, 1917; and plaintiff also prays judgment for its costs of suit.

ALFRED J. HARWOOD,
Attorney for Plaintiff.

Northern District of California,
City and County of San Francisco,—ss.

A. H. Anderson, being first duly sworn, deposes and says: That he is an officer of the plaintiff corporation, to wit, the assistant manager for California; that he makes this affidavit for and on behalf of said plaintiff; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge.

A. H. ANDERSON. [5]

Subscribed and sworn to before me this 2d day of August, 1917.

[Seal]

W. H. PYBURN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Aug. 2, 1917. Walter B. Maling, Clerk. [6]

(Title of Court and Cause.)

Appearance of Defendants.

William R. Larzelere and Joseph J. Sweeney, copartners doing business under the firm name of Larzelere, Sweeney Company, named as defendants in the above-entitled action in the complaint herein, hereby appear in the above-entitled cause by the undersigned, their attorneys.

Dated August 3d, 1917.

CHARLES W. SLACK,
CHAUNCEY S. GOODRICH and
ALFRED T. CLUFF,

Attorneys for Defendants.

Due service and receipt of a copy of the within appearance is hereby admitted this 4th day of August, 1917.

ALFRED J. HARWOOD,
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 4, 1917. Walter B. Maling, Clerk. [7]

(Title of Court and Cause.)

Demurrer to Complaint.

Now come defendants and demur to the complaint of the plaintiff herein on the following grounds, to wit:

I.

That the said complaint does not state facts sufficient to constitute a cause of action.

II.

That the said complaint does not state facts sufficient to constitute a cause of action against these defendants, or either of them.

III.

That the said complaint is uncertain in that it does not appear therein, nor can it be ascertained therefrom when the seventy-five tons of crated, brown Australian onions, mentioned in the contract set forth in paragraph IV of the said complaint were shipped from Australia to San Francisco.

IV.

That the said complaint is ambiguous in the particular in which it is hereinabove stated to be uncertain.

V.

That the said complaint is unintelligible in the particular in which it is hereinabove stated to be uncertain.

WHEREFORE defendants pray that they may be hence dismissed with their costs.

CHARLES W. SLACK,
CHAUNCEY S. GOODRICH and
ALFRED T. CLUFF,

Attorneys for Defendants.

[Endorsed]: Filed Aug. 23, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

At a stated term, to wit, the July term, A. D. 1917, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the Courtroom in the City and County of San Francisco, on Monday, the 24th day of September, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable WILLIAM H. SAWTELLE, District Judge for the District of Arizona, designated to hold and holding this Court.

(Title of Court and Cause.)

Order Overruling Demurrer.

Defendants' demurrer to the complaint came on to be heard and after arguments being submitted and fully considered, it was ordered that said demurrer be and the same is hereby overruled. [9]

(Title of Court and Cause.)

(Stipulation that Plaintiff may Amend Its Complaint.)

IT IS HEREBY STIPULATED that the plaintiff may amend its complaint herein in such particulars as its counsel may advise.

Dated: November 2d, 1917.

CHARLES W. SLACK,
CHAUNCEY S. GOODRICH and
ALFRED T. CLUFF,

Attorneys for Defendants.

The foregoing stipulation is hereby approved.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Nov. 8, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[10]

(Title of Court and Cause.)

Amendment to Complaint.

Now comes the plaintiff in the above-entitled action, and, by leave of Court first had and obtained, makes and files the following amendment to its complaint on file herein:

I.

Said complaint is hereby amended by striking therefrom all of the allegations contained in paragraph V of the original complaint herein, and by inserting in lieu thereof the following:

“V. That on the 26th day of February, 1916, plaintiff’s agents in Australia booked and reserved space for the shipment, on the steamer ‘Wattotara’ of the Union Steamship Company of New Zealand, of said 75 tons of crated brown Australian onions from Melbourne, Australia, to San Francisco; that prior to the 10th day of March, 1917, at Melbourne, Australia, plaintiff caused said 75 tons of crated brown Australian onions to be delivered to the Union Steamship Company of New Zealand, Limited, the owners of the steamer ‘Wattotara,’ for shipment by said steamer to San Francisco. That

when said space was reserved and said onions delivered, as aforesaid, said steamer was listed and scheduled to sail on March 10, 1917, direct from Melbourne to San Francisco. That through no fault of plaintiff, said steamer 'Wattotara' did not sail from Melbourne until March 16, 1917, and through no fault of plaintiff said steamer did not proceed direct from Melbourne to San Francisco, but proceeded to San Francisco by way of Vancouver, British Columbia; that plaintiff had no control over the sailing time of said steamer, nor did plaintiff have any control over the route which said steamer should take in sailing from Melbourne to San Francisco; that the time of the departure of said steamer from Melbourne and the route taken by said steamer [11] were determined and fixed by the said owners of said steamer. That the bill of lading covering said shipment, as well as all other bills of lading, issued by the owners of said steamer, contained the following provision:

"2. Steamer to have leave to deviate from any advertised route and to touch and stay at other Ports or places (although in a contrary direction to, or out of, or beyond, the ordinary or usual route to the port of discharge) once or oftener, in any order, backwards or forwards, for loading and/or discharging passengers and/or cargo and/or mails, or for any purpose of what kind soever, also to tow and assist vessels in all situations and to sail with or without Pilots."

That the bills of lading issued by all steamship owners operating steamers between Australian ports and ports in the United States of America contain provisions substantially similar to the said provision hereinabove set forth. That neither plaintiff nor its agents had knowledge, prior to March 14, 1917, that said steamer 'Wattotara' would proceed to San Francisco by way of Vancouver; that at all times prior to said 14th day of March, 1917, plaintiff and its agents believed that said steamer would sail direct from Melbourne to San Francisco. That no steamer other than said 'Wattotara' sailed from Melbourne to San Francisco between the 9th day of March, 1917, and the 17th day of March, 1917. That at the time of the delivery of said onions to the steamer in Australia, as aforesaid, said onions were of good quality and the said onions were then in good order and condition."

WHEREFORE plaintiff prays as it has prayed in its complaint herein.

ALFRED J. HARWOOD,
Attorney for Plaintiff. [12]

Northern District of California,
City and County of San Francisco,—ss.

A. H. Anderson, being first duly sworn, deposes and says: That he is an officer of the plaintiff corporation, to wit, the assistant manager for California; that he makes this affidavit for and on behalf of said plaintiff; that he has read the foregoing amendment to complaint, and knows the

contents thereof, and that the same is true of his own knowledge.

A. H. ANDERSON,

Subscribed and sworn to before me this 7th day of November, 1917.

[Seal]

W. H. PYBURN.

Notary Public in and for the City and County of San Francisco, State of California.

Service and receipt of a copy of the within amendment to complaint is hereby admitted this 5th day of November, 1917.

CHARLES W. SLACK,
CHAUNCEY S. GOODRICH and
ALFRED T. CLUFF,

Attorneys for Defendants.

[Endorsed]: Filed Nov. 8, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [13]

(Title of Court and Cause.)

Demurrer to Complaint as Amended.

Now come the defendants and demur to the complaint as amended of the plaintiff herein on the following grounds:

I.

That the said complaint as amended does not state facts sufficient to constitute a cause of action.

II.

That the said complaint as amended does not

state facts sufficient to constitute a cause of action against these defendants, or either of them.

III.

That the said complaint as amended is uncertain, nor does it appear therein, nor can it be *ascertain* therefrom, when the seventy-five (75) tons of crated brown Australian onions, mentioned in the contract set forth in paragraph IV of the said complaint as amended, were shipped from Australia to San Francisco.

IV.

That the said complaint as amended is ambiguous in the particular in which it is hereinabove stated to be uncertain.

V.

That the said complaint as amended is unintelligible in the particular in which it is hereinabove stated to be uncertain.

WHEREFORE, defendants pray that they be hence dismissed with their costs.

CHARLES W. SLACK,
CHAUNCEY S. GOODRICH and
ALFRED T. CLUFF,

Attorneys for Defendants.

Due service and receipt of a copy of the within demurrer is hereby admitted this 30th day of November, 1917.

ALFRED J. HARWOOD,
Attorney for Plaintiff. [14]

[Endorsed]: Filed Nov. 30, 1917. W. B. Maling,
Clerk. [15]

(Title of Court and Cause.)

Notice of Motion to Strike Out Portions of Complaint as Amended.

To George Wills & Sons, Limited, a Corporation,
the Above-named Plaintiff, and to Alfred J.
Harwood, Its Attorney:

You are hereby notified that on Monday, the 10th day of December, 1917, at the hour of 10 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, the above-named defendants will move the above-entitled court, at the courtroom thereof, in the United States Post Office Building, situated on the northeast corner of Seventh and Mission Streets, in the City and County of San Francisco, State of California, for an order striking out the following portions of the complaint as amended herein:

I.

All that portion of paragraph V of the said complaint as amended from the beginning thereof to and including the words "that no steamer other than said 'Waitotara' sailed from Melbourne to San Francisco between the 9th day of March, 1917, and the 17th day of March, 1917," in line 27, page 2, of the amendment to the said complaint.

II.

All that portion of paragraph IX of the said complaint as amended, commencing with the words "that the expenses necessarily incurred by plaintiff in preparing said onions for sale," in line 12,

page 4, of the said complaint, to and including the words "that in order to effect said sale it was necessary to pay said commission to said broker," in line 22, page 4, of the said complaint.

The said motion will be made upon the ground that the said [16] matters sought to be struck out consist of irrelevant matter, and will be based upon this notice and all of the pleadings, records, papers and files herein.

Dated this 30th day of November, 1917.

CHARLES W. SLACK,
CHAUNCEY S. GOODRICH and
ALFRED T. CLUFF,

Attorneys for Defendants.

Due service and receipt of a copy of the within Notice of Motion is hereby admitted this 30th day of November, 1917.

ALFRED J. HARWOOD,
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 30, 1917. W. B. Maling,
Clerk. [17]

At a stated term, to wit, the November term, A. D. 1917, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 18th day of February, in the year of our Lord one thousand nine hundred and eighteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

(Title of Court and Cause.)

(Order Overruling Demurrer to Amended Complaint.)

Defendants' demurrer to amended complaint and motion to strike out parts of amended complaint came on to be heard and after arguments was submitted and it was ordered that said demurrer be overruled and said motion denied. [18]

(Title of Court and Cause.)

Answer to Complaint as Amended.

The above-named defendants, for their answer to the complaint herein of the plaintiff as amended, state, deny and allege as follows:

I.

That as to the allegations of paragraph V of the said complaint as amended, "That on the 26th day of February, 1916, plaintiff's agents in Australia booked and reserved space for the shipment, on the steamer 'Wattotara' of the Union Steamship Company of New Zealand, of said 75 tons of crated brown Australian onions from Melbourne, Australia, to San Francisco; that prior to the 10th day of March, 1917, at Melbourne, Australia, plaintiff caused said 75 tons of crated brown Australian onions to be delivered to the Union Steamship Company of New Zealand, Limited, the owners of the steamer 'Wattotara,' for shipment by said steamer to San Francisco; that when said space was re-

served and said onions delivered, as aforesaid, said steamer was listed and scheduled to sail on March 10, 1917, direct from Melbourne to San Francisco; that through no fault of plaintiff, said steamer 'Wattotara' did not said from Melbourne until March 16, 1917"; "that the bill of lading covering said shipment, as well as all other bills of lading, issued by the owners of said steamer, contained the following provision:

'2. Steamer to have leave to deviate from any advertised route and to touch and stay at other Ports or places (although in a contrary direction to, or out of, or beyond, the ordinary or usual route to the port of discharge) once or oftener, in any order, [19] backwards or forwards, for loading and/or discharging passengers and/or cargo and/or mails, or for any purpose of what kind soever, also to tow and assist vessels in all situations and to sail with or without Pilots';

that the bills of lading issued by all steamship owners operating steamers between Australian ports and ports in the United States of America contain provisions substantially similar to the said provisions hereinabove set forth"; "that at the time of the delivery of said onions to the steamer in Australia, as aforesaid, said onions were of good quality and the said onions were then in good order and condition"; the defendants state that they have no information or belief upon the subject of the said allegations sufficient to enable them to answer the same, and placing their denial thereof on that

ground, they deny each and all and every part of the said allegations.

II.

The defendants deny, according to their information and belief, that neither the plaintiff nor its agents had knowledge, prior to the 14th day of March, 1917, that the Steamer "Wattotara," mentioned in the said complaint as amended, would proceed to San Francisco by way of Vancouver; and deny, according to their information and belief, that at all or any times prior to the said 14th day of March, 1917, the plaintiff and its agents, or any of them, believed that the said steamer would sail direct from Melbourne to San Francisco; and in this connection the defendants allege that they are informed and believe, and according to such information and belief allege the facts to be, that the plaintiff and its agents knew, or by the exercise of reasonable diligence might have known, prior to the said 14th day of March, 1917, and also prior to the 10th day of March, 1917, [20] and also prior to the delivery by the plaintiff of the said onions at Melbourne for shipment to San Francisco, that the said steamer would not sail direct from Melbourne to San Francisco but would sail from Melbourne to San Francisco by a circuitous route, and that in consequence delivery of the said onions by the plaintiff to the defendants might be unreasonably delayed.

III.

That as to the allegations of paragraph IX of the said complaint as amended, "That thereafter, to

wit, on or about the 26th day of May, 1917, plaintiff sold said 75 tons of brown Australian onions in the open market in San Francisco at the market price thereof; that plaintiff received as the purchase price at said sale the sum of Two Thousand Five Hundred and Seventy-nine and 57/100 Dollars (\$2,579.57); that the expenses necessarily incurred by plaintiff in preparing said onions for sale amounted to the sum of Four Hundred and Six and 20/100 Dollars (\$406.20); that plaintiff paid as a commission to the broker who negotiated said sale for plaintiff a commission of one per cent (1%), which said commission amounted to the sum of Twenty-five and 79/100 Dollars (\$25.79); that said commission is the usual, customary and ordinary commission paid on such sales in the City and County of San Francisco; that said commission is the reasonable compensation of the said broker for his services; that in order to effect said sale it was necessary to pay said commission to said broker; that after deducting the said expenses necessarily incurred by plaintiff in preparing said onions for sale and the said commssion paid to said broker, plaintiff received as the net proceeds of said sale the sum of Two Thousand One Hundred and Forty-seven and 57/100 Dollars (\$2,147.57)"; the defendants state that they have no information or belief upon the subject of the said allegations sufficient to enable them to answer the same, and placing their denial thereof on that ground, they deny each and all and every part of the said allegations. [21]

IV.

The defendants deny, except as hereinafter otherwise alleged, that by the said contract set forth in paragraph IV of the said complaint as amended, the defendants agreed to pay to the plaintiff the sum of \$6,720 as the purchase price of the said onions; and allege, in this connection, that the defendants agreed to pay to the plaintiff for the said onions the price stipulated in the said contract to be paid by them on the performance only by the plaintiff of the conditions set forth in the said contract to be performed by the plaintiff, and on the performance only by the plaintiff of the further condition to be performed by the plaintiff that the said onions should be shipped by the plaintiff from Australia to San Francisco by the most direct steamship line operating between Australia and San Francisco; and further allege in this connection that the plaintiff did not ship the said onions from Australia to San Francisco until the 16th day of March, 1917; that at the time the said contract was entered into there was and had been for a long time prior thereto a general and well-established and well-known custom existing in San Francisco among dealers in onions at that place that onions sold in San Francisco to be shipped from Australia to San Francisco should be shipped by the most direct steamship lines operating between Australia and San Francisco, and it was understood and agreed between the plaintiff and the defendants at the time the said contract was entered into that shipment of the said onions was to be made by the plaintiff from Australia to

San Francisco by the most direct steamship line operating between Australia and San Francisco; that contrary to the said custom and to the said understanding and agreement, the plaintiff did not ship the said onions by the most direct steamship line operating between Australia and San Francisco, but shipped the said onions by the said Steamer "Wattotara"; that as the defendants are informed and believe, and according to such [22] information and belief allege the facts to be that plaintiff knew, or by the exercise of reasonable diligence might have known, at the time of the said shipment, that the said steamer "Wattotara" was a so-called "tramp" steamer having no regular ports of call, and that the said steamer would not sail direct from Australia to San Francisco but would sail from Australia to San Francisco by the circuitous route hereinafter alleged; that as the defendants are informed and believe, and according to such information and belief allege the facts to be, the said steamer sailed on the 16th day of March, 1917, from Melbourne, Australia, to Sydney, Australia, thence to Wellington, New Zealand, thence to Vancouver, British Columbia, and thence to San Francisco, and arrived in the port of San Francisco on the 19th day of May, 1917; that during all the times herein mentioned, as the plaintiff well knew, the most direct steamship line operating between Australia and San Francisco was the line of the Oceanic Steamship Company; that had the plaintiff shipped the said onions by the said most direct steamship line operating between Australia and

San Francisco the said onions would have arrived in San Francisco on the 9th day of April, 1917; that the fair market price in San Francisco on the said 9th day of April, 1917, of onions of the kind and quality mentioned in the said contract was seven and one-half ($7\frac{1}{2}$) cents per pound; that the fair market price in San Francisco on the said 19th day of May, 1917, of onions of the kind and quality mentioned in the said contract was two (2) cents per pound; and that the difference between the said prices on the two last mentioned dates was due to the fact that the crop of onions in California for the season of 1917 was not in market in San Francisco on the said 9th day of April, 1917, but was in market in San Francisco on the 1st day of May, 1917, and thereafter during the month of May, 1917. [23]

V.

The defendants deny that there was any breach of the said contract by the defendants as alleged in the said complaint as amended; and deny that the plaintiff has been damaged in the sum of \$4,572.43, or in any other sum.

Further answering the said complaint, and by way of counterclaim, the defendants allege:

I.

That on the 19th day of February, A. D. 1917, the plaintiff and the defendants entered into the contract in writing set forth in the said complaint; that at the time the said contract was entered into there was and had been for a long time prior thereto a general and well-established and well known cus-

tom existing in San Francisco among dealers in onions at that place that onions sold in San Francisco to be shipped from Australia to San Francisco should be shipped by the most direct steamship line operating between Australia and San Francisco; and that it was understood and agreed between the plaintiff and the defendants at the time the said contract was entered into that shipment of the said onions was to be made by the plaintiff from Australia to San Francisco by the most direct steamship line operating between Australia and San Francisco.

II.

That contrary to the said custom, and to the said understanding and agreement, the plaintiff failed and neglected to ship the said onions by the most direct steamship line operating between Australia and San Francisco; that by reason of the said failure to ship by the said most direct steamship line the said onions did not arrive in San Francisco until the 19th day of May, 1917; that had the plaintiff shipped the said onions by the said most direct steamship [24] line operating between Australia and San Francisco the said onions would have arrived in San Francisco on the 9th day of April, 1917; that the fair market price in San Francisco on the said 9th day of April, 1917, of onions of the kind and quality mentioned in the said contract was seven and one-half ($7\frac{1}{2}$) cents per pound; and that the fair market price in San Francisco on the said 19th day of May, 1917, of onions of the kind and quality

mentioned in the said contract was two (2) cents per pound.

III.

That by reason of the failure of the plaintiff to ship the said onions by the most direct steamship line operating between Australia and San Francisco the defendants suffered in damages in the sum of six thousand three hundred dollars (\$6,300).

WHEREFORE, the defendants pray that the plaintiff take nothing by reason of its said action, and that the defendants have judgment against the plaintiff in the sum of six thousand three hundred dollars (\$6,300), with interest thereon from the said 9th day of April, A. D. 1918, at the rate of seven (7) per cent per annum, and for their costs of suit.

CHARLES W. SLACK,
CHAUNCEY S. GOODRICH and
ALFRED T. CLUFF,

Attorneys for Defendants.

State of California,
City and County of San Francisco,—ss.

William R. Larzelere, being first duly sworn, deposes and says:

That he is one of the defendants named in the foregoing answer; that he has read the said answer and knows the contents thereof; and that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be [25] true.

WILLIAM R. LARZELERE.

Subscribed and sworn to before me this 15th day of July, A. D. 1918.

[Seal] CHARLES EDELMAN,
Notary Public in and for the City and County,
of San Francisco, State of California.

My commission expires April 7, 1922.

Service of the within answer is hereby admitted this 17th day of July, 1918.

ALFRED J. HARWOOD,
Attorney for Plaintiff.

[Endorsed]: Filed Jul. 18, 1918. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [26]

(Title of Court and Cause.)

Waiver of Jury Trial.

The parties to the above-entitled action hereby waive a jury trial.

Dated: February 18th, 1922.

ALFRED J. HARWOOD,
Attorney for Plaintiff.

CHARLES W. SLACK and
EDGAR T. ZOOK,

Attorneys for Defendants.

[Endorsed]: Filed Feb. 18, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [27]

At a stated term, to wit, the March term, A. D. 1922, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Wednesday, the 3d day of May, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,090.

GEORGE WILLS & SONS, LTD.,

vs.

WILLIAM R. LARZELERE et al.

(Order Granting Motion for Nonsuit, etc.)

This cause came on regularly this day for trial before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation filed; Alfred J. Harwood, Esq., appearing as attorney for plaintiff and Edgar T. Zook, Esq., appearing as attorney for defendants. By consent it is ordered that plaintiff may file its re-engrossed amended complaint. Mr. Harwood made the opening statement on behalf of plaintiff and counsel orally stipulated to certain facts. Plaintiff introduced in evidence the depositions of Francis A. Drake and Mark F. Shea; and introduced in evidence and filed its exhibits marked "1" and "2"; and A. A. Anderson was sworn and testified

on behalf of plaintiff. Plaintiff rested. Defendants moved for a nonsuit on the grounds stated and after arguments the motion was submitted and being fully considered it was ordered that said motion be and is hereby granted and that a judgment of nonsuit, with costs to the defendants, be entered herein; to which ruling the plaintiff duly excepted. [28]

(Title of Court and Cause.)

Amended Complaint (Re-Engrossed).

Now comes George Wills & Sons, Limited, a corporation, duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, and lawfully transacting business in the State of California, and in the City and County of San Francisco in the Southern Division of the Northern District thereof, and complains of the defendants, William R. Larzelere and Joseph J. Sweeney, copartners doing business under the firm name of Larzelere, Sweeney Company, and for cause of action alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland; and at all of said times was lawfully transacting business in the City and County of San Francisco, in the Southern Division of the Northern District of California.

II.

That defendants are, and at all times herein mentioned were, copartners doing business under the firm name of Larzelere, Sweeney Company; that each of said defendants is, and at all times herein mentioned was, a citizen and resident of the State of California.

III.

That the amount in controversy in this suit exceeds, exclusive of interest and costs, the sum or value of Three Thousand dollars (\$3,000); that this suit is between citizens of the State of California and a citizen and subject of a foreign State, viz., the United Kingdom of Great Britain and [29] Ireland.

IV.

That on the 19th day of February, 1917, at the said City and County of San Francisco, the plaintiff and the defendants executed and entered into a contract in writing in the words and figures following, to wit:

“San Francisco, California, U. S. A.
Feb. 19, 1917.

Larzelere, Sweeney Co.,
San Francisco.

Dear Sirs:

We hereby confirm the sale to you, through Mr. M. J. O'Reilly, of

75 (Seventy-five) tons of 2240 lbs. Crated
Brown Australian Onions
at the price of 4 (four) cents U. S. currency per

pound, landed on the Dock, duty paid, San Francisco.

Shipment to be effected from Australia by steamer on the 10th of March, 1917.

Quality of the Onions delivered to the steamer in Australia to be guaranteed and a Certificate for same will be provided.

The Onions to be paid for by you in Cash on arrival in San Francisco.

This Contract is of course subject to the usual clause exempting us from claims of any nature, through nonfulfillment caused by conditions, over which we have no control.

Yours faithfully,

For GEORGE WILLS & SONS, LTD.

A. H. ANDERSON,

Manager.

Accepted:

LARZELERE SWEENEY CO." [30]

V.

That on the 26th day of February, 1916, plaintiff's agents in Australia booked and reserved space for the shipment, on the steamer "Waitotara" of the Union Steamship Company of New Zealand, of said 75 tons of crated brown Australian onions from Melbourne, Australia, to San Francisco; that prior to the 10th day of March, 1917, at Melbourne, Australia, plaintiff caused said 75 tons of crated brown Australian onions to be delivered to the Union Steamship Company of New Zealand, Limited, the owners of the steamer "Waitotara," for shipment by said steamer to San Francisco. That

when said space was reserved and said onions delivered, as aforesaid, said steamer was listed and scheduled to sail on March 10, 1917, direct from Melbourne to San Francisco. That through no fault of plaintiff, said steamer "Waitotara" did not sail from Melbourne until March 16, 1917, and through no fault of plaintiff said steamer did not proceed direct from Melbourne to San Francisco, but proceeded to San Francisco by way of Vancouver, British Columbia; that plaintiff had no control over the sailing time of said steamer, nor did plaintiff have any control over the route which said steamer should take in sailing from Melbourne to San Francisco; that the time of the departure of said steamer from Melbourne and the route taken by said steamer were determined and fixed by the said owners of said steamer. That the bill of lading covering said shipment, as well as all other bills of lading, issued by the owners of said steamer, contained the following provision:

"2. Steamer to have leave to deviate from any advertised route and to touch and stay at other Ports or places (although in a contrary direction to, or out of, or beyond, the ordinary or usual route to the port of discharge) once or oftener, in any order, backwards or forwards, for loading and/or discharging passengers [31] and/or cargo and/or mails, or for any purpose of what kind soever, also to tow and assist vessels in all situations and to sail with or without Pilots."

That the bills of lading issued by all steamship owners operating steamers between Australian ports and the ports in the United States of America contain provisions substantially similar to the said provisions hereinabove set forth. That neither plaintiff nor its agents had knowledge, prior to March 14th, 1917, that said steamer "Waitotara" would proceed to San Francisco by way of Vancouver; that at all times prior to said 14th day of March, 1917, plaintiff and its agents believed that said steamer would sail direct from Melbourne to San Francisco. That no steamer other than said "Waitotara" sailed from Melbourne to San Francisco between the 9th day of March, 1917, and the 17th day of March, 1917. That at the time of the delivery of said onions to the steamer in Australia, as aforesaid, said onions were of good quality and the said onions were then in good order and condition. That said onions were loaded on board said steamer before the 10th day of March, 1917.

VI.

That on the 19th day of May, 1917, said 75 tons of crated brown Australian onions arrived in San Francisco, and thereupon plaintiff notified defendants of the arrival of the same; that plaintiff thereupon caused said onions to be landed on the dock and thereupon paid the duty thereon.

VII.

That on the 22d day of May, 1917, plaintiff offered in writing to deliver said onions to defendants upon payment of the purchase price thereof by defendants to plaintiff; that said offer in writ-

ing was delivered to defendants on the said 22d day of May, 1917, and was and is in words and figures following, to wit: [32]

“San Francisco, May 22, 1917.

Larzelere Sweeney Company,
San Francisco, California.

Dear Sirs:

Referring to sale by us to you of 75 tons of 2240 lbs. crated brown Australian Onions, as per our letter to you under date of February 19, 1917 and your written acceptance endorsed thereon: The property covered by this contract of sale has arrived in San Francisco and is landed at the dock and duty is paid. We hereby offer to deliver to you the said property upon payment of the purchase price. We also offer to provide and deliver to you the certificate called for by said contract of sale.

Yours faithfully,
GEORGE WILLS & SONS, LTD.,
By A. H. ANDERSON,
Manager.”

VIII.

That defendants failed and refused to accept delivery of said onions; that defendants failed and refused to pay the purchase price thereof; that defendants never accepted delivery of said onions and never paid the purchase price thereof.

IX.

That thereafter, to wit, on or about the 26th day of May, 1917, plaintiff sold the 75 tons of brown Australian onions in the open market in San Fran-

cisco at the market price thereof; that plaintiff received as the purchase price at said sale the sum of Two Thousand Five Hundred and Seventy-nine and 57/100 Dollars (\$2,579.57); that the expenses necessarily incurred by plaintiff in preparing said onions for sale amounted to the sum of Four Hundred and Six and 20/100 Dollars (\$406.20); that plaintiff paid as a commission to the broker who negotiated said sale for plaintiff [33] a commission of one per cent (1%), which said commission amounted to the sum of Twenty-five and 79/100 Dollars (\$25.79); that said commission is the usual, customary and ordinary commission paid on such sales in the City and County of San Francisco; that said commission is the reasonable compensation of said broker for his services. That in order to effect said sale it was necessary to pay said commission to said broker. That after deducting the said expenses necessarily incurred by plaintiff in preparing said onions for sale and the said commission paid to said broker, plaintiff received as the net proceeds of said sale the sum of Two Thousand One Hundred and Forty-seven and 57/100 Dollars (\$2,147.57). That by said contract set forth in Paragraph IV of this complaint, the defendants agreed to pay to plaintiff the sum of Six Thousand Seven Hundred and Twenty Dollars (\$6,720.00) as the purchase price of said onions.

X.

That by reason of the said breach of said contract by defendants, plaintiff has been damaged in the sum of Four Thousand Five Hundred and Sev-

enty-two and 43/100 Dollars (\$4,572.43); that prior to the commencement of this action plaintiff demanded of defendants that said defendants pay said sum of Four Thousand Five Hundred and Seventy-two and 43/100 Dollars (\$4,572.43) to plaintiff, but that defendants failed and refused to pay the same, or any part thereof; that defendants have not paid to plaintiff the said sum of Four Thousand Five Hundred and Seventy-two and 43/100 Dollars (\$4,572.43), or any part thereof.

WHEREFORE, plaintiff prays judgment against defendants for the sum of Four Thousand Five Hundred Seventy-two and 43/100 Dollars (\$4572.-43), together with interest thereon at the rate of seven per cent (7%) per annum, from the said 26th day of May, 1917; and plaintiff also prays judgment for its costs of suit.

ALFRED J. HARWOOD,

Attorney for Plaintiff. [34]

Northern District of California,
City and County of San Francisco,—ss.

A. H. Anderson, being first duly sworn, deposes and says: That he is an officer of the plaintiff corporation, to wit, the assistant manager for California; that he makes this affidavit for and on behalf of said plaintiff; that he has read the foregoing amended complaint and knows the contents thereof, and that the same is true of his own knowledge.

A. H. ANDERSON.

Subscribed and sworn to before me this 29 day of April, 1922.

[Seal]

E. M. CLARK,

Notary Public, in and for the City and County of San Francisco, State of California.

Service of the within amended complaint as re-engrossed is hereby admitted this 1st day of May 1922.

CHARLES W. SLACK, and

EDGAR T. ZOOK,

Attorneys for Defendants.

[Endorsed]: Filed May 3d, 1922. Walter B. Maling, Clerk. [35]

(Title of Court and Cause.)

Judgment of Nonsuit.

This cause having come on regularly for trial on the 3d day of May, 1922, before the Court sitting without a jury, a trial by jury having been waived by written stipulation filed; Alfred J. Harwood, Esq., appearing as attorney for plaintiff and Edgar T. Zook, Esq., appearing as attorney for the defendants; and the trial having been proceeded with and evidence having been introduced on behalf of plaintiff and the attorney for the defendants having, at the close of plaintiff's case, moved the Court for a judgment of nonsuit and the Court, after due consideration, having ordered that said motion be granted and that a judgment of nonsuit be entered herein with costs to the defendants:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action; that judgment of nonsuit be and the same is hereby entered against said plaintiff herein; that defendants go hereof without day and that said defendants do have and recover of and from said plaintiff their costs herein expended taxed at \$40.55.

Judgment entered May 3, 1922.

WALTER B. MALING,
Clerk.

A true copy.

[Seal] Attest: WALTER B. MALING,
Clerk.

[Endorsed]: Filed May 3, 1922. Walter B. Mal-
ing, Clerk. [36]

(Title of Court and Cause.)

(Clerk's Certificate to Judgment-Roll.)

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court, this 3d day of May 1922.

[Seal] WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed May 3, 1922. Walter B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[37]

In the Southern Division of the District Court of
the United States in and for the Northern Dis-
trict of California, Second Division.

No. 16,090.

GEORGE WILLS & SONS, LIMITED, a Corpora-
tion,

Plaintiff,

vs.

WILLIAM R. LARZELERE and JOSEPH J.
SWEENEY, Copartners, Doing Business
Under the Firm Name of LARZELERE,
SWEENEY COMPANY,

Defendants.

Plaintiff's Bill of Exceptions.

BE IT REMEMBERED that the above-entitled
cause came duly on for trial on the 3d day of May,
1922, before Honorable William C. Van Fleet,
Judge of the above-entitled court, sitting without a
jury (a jury having been waived by stipulation of
the parties in writing), Alfred J. Harwood, Esq.,
appearing as attorney for the plaintiff, and Messrs.
Charles W. Slack, Edgar T. Zook and A. T. Cluff,
appearing as attorneys for the defendants, where-
upon the following proceedings were had:

Mr. HARWOOD.—If the Court please, certain of
the facts in this case have been stipulated to, and

pursuant to a trial stipulation entered into between the parties it has been stipulated that the following facts which I will read are deemed to be true, and that no evidence thereof need be offered by either party: "That on or about May 26th, 1917, plaintiff sold the said shipment of brown Australian Onions (crated) (referred to in the complaint), in the open market in San Francisco for the sum of [38] Two Thousand Five Hundred and Seventy-nine and 57/100 Dollars (\$2,579.57); that the said price was the reasonable market value of the said onions in their then condition on said date; that plaintiff paid as a commission to the broker who negotiated said sale for plaintiff a commission of one per cent (1%), which said commission amounted to the sum of Twenty-five and 79/100 Dollars (\$25.79); that said commission is the usual, customary and ordinary commission paid on such sales in the City and County of San Francisco; that said commission is the reasonable compensation of said broker for his services. That in order to effect said sale it was necessary to pay said commission to said broker. That after deducting the said commission paid to said broker, plaintiff received as the net proceeds of said sale the sum of Two Thousand Five Hundred and Fifty-three and 78/100 Dollars (\$2,553.78)." That is stipulated to, Mr. Zook?

MR. ZOOK.—Yes, that is stipulated to without objection. Some of these facts are stipulated to subject to their materiality and relevancy, but as to these facts there is no objection made.

Mr. HARWOOD.—It also has been stipulated that the bills of lading issued in 1916, and 1917, by the Oceanic Steamship Company, (which Company operates a line of steamers between Australia and San Francisco) contain a clause providing that the steamship company shall have the right “to lighter from steamer to steamer and from steamer to shore, and to touch at port or ports, in any order of rotation without being deemed a deviation.” That is also admitted?

Mr. ZOOK.—The fact is admitted, but I would like to reserve my objection to that until an additional fact is read and make my objection to it at that time. [39]

The COURT.—The fact that there was such a clause in the bills of lading of the Oceanic Steamship Company is admitted, but its materiality is reserved.

Mr. ZOOK.—Yes, your Honor. All of these facts are admitted to be facts.

Mr. HARWOOD.—Therefore, if your Honor please, the stipulation which I have read, or, rather, the facts which have been agreed to in conjunction with the answer prove all of the allegations of the complaint, as I see it, with the exception of the allegations in Paragraph 5 of the amended complaint, and they are to be proved by depositions.

Deposition of Francis Archibald Drake, for Plaintiff.

The deposition of FRANCIS ARCHIBALD DRAKE was thereupon read in evidence as follows:

“Interrogatory No. 1. What is your name, residence and occupation?”

(Deposition of Francis Archibald Drake.)

Ans. Francis Archibald Drake, Arncliffe N. S. W. Salesman.

Interrogatory No. 2. Referring to bill of lading handed you, please state if said bill of lading was ever in your possession? (Bill of Lading to be attached to deposition as an exhibit.)

Ans. Yes.

Interrogatory No. 3. From whom did you receive this bill of lading?

Ans. Messrs. Shea Hood & Co. of Melbourne who received the Bill of Lading from the Union Co. after putting the Onions aboard as our Shippers.

Interrogatory No. 4. Do you know when the space for this shipment of onions was booked or reserved with Union Steamship [40] Company of New Zealand, Ltd.?

Ans. Yes.

Interrogatory No. 5. If the answer to the preceding interrogatory was 'Yes,' please state when said space was booked.

Ans. February 26th, 1917.

Interrogatory No. 6. At the time this space was booked, for what voyage was the 'Waitotara' advertised or scheduled?

Ans. Our advice was that the 'Waitotara' was engaged to sail for San Francisco, and we knew of no extraordinary deviation."

Mr. ZOOK.—We object to that answer, if your Honor please, as hearsay, that is, that part of the answer reading: "And we knew of no extraordinary deviation."

(Deposition of Francis Archibald Drake.)

The COURT.—That part of the answer may go out as not responsive. I think the first part is fairly responsive. In transactions of that kind you are bound to take some things on representation. The latter part of the answer goes out because it is not responsive, it is purely a voluntary statement.

To said ruling of the Court plaintiff then and there duly excepted.

EXCEPTION No. 1.

“Interrogatory No. 7. Did you attend to the shipping of those onions?”

Ans. Shea Hood did the shipping under our directions through our agents—Messrs. H. Hecht & Co., Melbourne.

Interrogatory No. 8. When did you commence to deliver these onions to the steamer ‘Waitotara’?

Ans. According to advices—late in February.”
[41]

Mr. ZOOK.—We move that that answer be stricken out on the ground that it is based on hearsay.

Mr. HARWOOD.—We consent to that.

The COURT.—Let that answer be stricken out.

“Interrogatory No. 9. When was the delivery completed?”

Ans. According to advices March 7th.”

Mr. ZOOK.—The same objection.

The COURT.—That will be stricken out.

“Interrogatory No. 10. Before the completion of the delivery of the onions to the Steamer, had you been informed by Union Steamship Company of

(Deposition of Francis Archibald Drake.)

New Zealand, Ltd., or by anyone else, that the 'Waitotara' would not sail direct to San Francisco?

Ans. No.

Interrogatory No. 11. Before the completion of the delivery of the onions to the Steamer, had any one connected with the firm of George Wills & Company, Limited, to your knowledge, been informed that the 'Waitotara' would not sail direct to San Francisco?

Ans. No.

Interrogatory No. 12. When did you first learn that the 'Waitotara' would proceed to San Francisco via Vancouver?

Ans. Too late to divert owing to onions being already loaded. In fact the ship had sailed before I knew of the diversion.

Interrogatory No. 13. How and under what circumstances did you learn this?

Ans. As far as I recollect, direct from Union Steamship Company.

Interrogatory No. 14. At or before the time of the delivery of the onions to the steamer, did you know that the 'Waitotara' [42] would proceed to San Francisco via Vancouver?

Ans. No.

Interrogatory No. 15. To your knowledge, at or before the time of the delivery of the onions to the steamer, did anyone connected with George Wills & Sons, Limited, know that the 'Waitotara' would proceed to San Francisco via Vancouver?

Ans. Not to my knowledge.

(Deposition of Francis Archibald Drake.)

Interrogatory No. 16. When did you first learn that the 'Waitotara' would touch at Wellington and Sydney on its way to San Francisco?

Ans. Not until after ship had sailed.

Interrogatory No. 17. Were the onions delivered to the Union Steamship Company at the dock when you first received this information?

Ans. Yes, and ship had sailed. See previous answer above.

Interrogatory No. 18. After you learned that the 'Waitotara' would not proceed to San Francisco by a direct route, what, if any, efforts did you make to cancel the freight and to ship by another steamer? In answer to this question state fully what efforts were made and also state the result of such efforts.

Ans. See No. 17. Nothing could be done because ship had sailed.

Interrogatory No. 19. At the time the space for this shipment of onions was booked, when was the 'Waitotara' scheduled or listed to sail from Melbourne for San Francisco?

Ans. March 10th, 1917.

Interrogatory No. 20. When did the 'Waitotara' actually sail from Melbourne for San Francisco?

Ans. According to advices March 16th, 1917.
[43]

Interrogatory No. 21. Did any steamer other than the 'Waitotara' sail from Melbourne for San Francisco between March 9, 1917, and March 17, 1917?

Ans. Not to my knowledge.

(Deposition of Francis Archibald Drake.)

Interrogatory No. 22. At the time of the delivery of said onions to the 'Waitotara,' what was the condition of the onions?

Ans. First-class according to Government Grader's Certificate."

Mr. ZOOK.—I object to that, because the certificate speaks for itself. I ask that that be stricken out.

The COURT.—Yes, let that go out.

To said ruling counsel for plaintiff then and there duly excepted.

EXCEPTION No. 2.

"Interrogatory No. 23. At the time of the delivery of said onions to the 'Waitotara,' what was the quality of said onions?

Ans. Brown Spanish, and also see No. 22."

Mr. ZOOK.—I ask that that be stricken out, also, your Honor. It must necessarily be stricken out, because the previous answer was stricken out.

The COURT.—Yes.

To said ruling of the Court counsel for plaintiff then and there duly excepted.

EXCEPTION No. 3.

"Cross-Interrogatory No. 1. If your answer to direct interrogatory No. 4 is 'Yes,' state whether or not you know, of your own knowledge, when that space was booked or reserved. [44]

Ans. Yes. February 26, 1917.

Cross-Interrogatory No. 2. By whom was this space booked or reserved? If by yourself, with

(Deposition of Francis Archibald Drake.)

what officer, if any, of the Union Steamship Company, Ltd., did you discuss the matter?

Ans. Ourselves, 100 tons—Remainder Shea Hood & Co. Cannot say with what officer.

Cross-Interrogatory No. 3. By what means was the steamer 'Waitotara,' mentioned in direct interrogatory No. 6, advertised or scheduled for the voyage described by you?

Ans. Was not advertised to my knowledge. Was scheduled on regular listings.

Cross-Interrogatory No. 4. Do you understand by 'sailing direct to San Francisco' that the steamer would sail from Melbourne to San Francisco in the most direct line compatible with the proper navigation of the steamer and without touching at any intermediate or other ports on the way?

Ans. Yes that would be my understanding, but the shipping agents could divert under Bill of Lading clauses, notwithstanding a statement that a vessel was a direct steamer."

Mr. ZOOK.—I ask that the part of said answer after the word "understanding" be stricken out as the conclusion of the witness.

The COURT.—Yes, that is improper.

To said ruling of the Court in striking out said answer, counsel for plaintiff then and there duly excepted.

EXCEPTION No. 4.

"Cross-Interrogatory No. 5. What ports, if any, were you informed that the 'Waitotara' would visit

(Deposition of Francis Archibald Drake.)

upon this voyage from Melbourne [45] to San Francisco?

Ans. I was given to understand that it was a direct sailing to San Francisco.

Cross-Interrogatory No. 6. Did you make any inquiry of any of the officials of the Union Steamship Company, Ltd., before you commenced to deliver the onions covered by the bill of lading mentioned in Interrogatory No. 2 as to the time of departure or route to be followed by the 'Waitotara'?

Ans. Yes, I did make enquiry and was informed that the 'Waitotara' would sail on the 10th March from Melbourne to San Francisco as a direct steamer, which information it was necessary for me to ascertain in the first negotiating for the business."

Mr. ZOOK.—I ask that the part of said answer after the word "steamer" be stricken out as not responsive.

The COURT.—Let it go out. It is a mere interpolation of something not required in answering the interrogatory.

To said ruling of the Court, counsel for plaintiff then and there duly excepted.

EXCEPTION No. 5.

"Cross-Interrogatory No. 7. Did you make any such inquiry prior to the completion of delivery of the onions to the steamer?

Ans. No direct inquiry was made to the Company as to any alteration in the date of sailing

(Deposition of Francis Archibald Drake.)

between the date that the space was booked and the date of the completion of the delivery of the onions to this steamer, for having booked space on her we naturally did not think this was necessary, for it was fair to assume that as interested parties, the company would have [46] advised us, without application to them, if a serious alteration in the date of sailing or in the sailing route was made. We were never informed by the Company of any such alteration."

Mr. ZOOK.—I ask that all of that portion of the answer "having booked space on her we naturally did not think this was necessary, for it was fair to assume that as interested parties, the company would have advised us, without application to them, if a serious alteration in the date of sailing or in the sailing route was made," I ask that that be stricken out as argumentative.

The COURT.—It is not responsive.

Mr. HARWOOD.—But the latter part, "We were never informed by the company of any such alteration," that will remain in?

The COURT.—Yes, because that is a fact; the other is mere argument.

To the said ruling of the Court, counsel for plaintiff then and there duly excepted.

EXCEPTION No. 6.

"Cross-Interrogatory No. 8. Did you ever make any effort to ship these onions by the steamers of the Oceanic Line?

Ans. Yes, but could not get space.

(Deposition of Francis Archibald Drake.)

Cross-Interrogatory No. 9. Do you not know that the steamers of that line ply between Australia and San Francisco on a regular schedule over a regular route and do not deviate from that route except in the event of a great emergency?

Ans. Yes, we are in close touch with the Oceanic Company and keep posted on sailings. Since the outbreak of the European War the sailing dates of all steamers are merely tentative and are [47] liable to be changed upon very short notice.

Cross-Interrogatory No. 10. Are not the sailing dates and arrivals of the Oceanic Line Steamers and the route to be followed by them on each voyage advertised a year or more in advance of their sailing dates?

Ans. Whilst dates might be fixed as far as twelve months ahead no booking for space for anything like such a time would be made, but this is altogether outside the question, and has nothing whatever to do with the 'Waitotara' sailing which was a specific instance."

Mr. ZOOK.—That whole answer is not responsive to the question.

The COURT.—No, that is not responsive to the question, that will be stricken out.

To said ruling of said Court counsel for plaintiff then and there duly excepted.

EXCEPTION No. 7.

Counsel for plaintiff thereupon offered in evidence the bill of lading attached to said deposition of Francis Archibald Drake and said bill of lad-

ing was thereupon received and read in evidence, marked Plaintiff's Exhibit No. 1, and was and is in words and figures following, to wit: [48]

Plaintiff's Exhibit No. 1.

UNION STEAMSHIP COMPANY OF NEW ZEALAND, LIMITED.

Shipped in apparent good order and condition by GEO. WILLS & CO. LTD. on board the UNION STEAMSHIP COMPANY'S S. S. "WAITOTARA" whereof RITCHIE is Master, now lying in the Port of SYDNEY and bound for SAN FRANCISCO via intermediate Ports, Four thousand, four-hundred, and twenty-eight crates Onions (28 crates in dispute if on board to be delivered) being marked and numbered as in the margin, and to be delivered (subject to the exceptions and stipulations herein-after mentioned) in the like good order and condition, at the aforesaid Port of San Francisco unto Order or to assigns, freight for the said goods to become due on shipment and to be paid in cash without deduction.

SYDNEY TO
SAN FRAN-
CISCO

G. W.
S. F.

4428 crates
onions.

THE FOLLOWING ARE THE EXCEPTIONS AND STIPULATIONS REFERRED TO.

1. The Act of God, the King's Enemies, Pirates, Robbers or Thieves by land or sea, whether in the service of the Company or otherwise, Restraints of Princes, Rules or People, Restrictions and consequences of Quarantine, the Requirements of Mail Service, Riots, Strikes, or Lock-outs, or other La-

236 tons, 5
cwt. 2 qrs.
21 lbs. @
91/—.
£1075/1/9

bour Disturbances or delay caused directly or indirectly thereby, Fire afloat or ashore, Jettison, Barratry, Vermin, Collision or Stranding, and all Accidents, Loss or Damages whatsoever, from Machinery, Boilers or Steam, or from the neglect or default or error in judgment of Pilot, Master or Crew, or other servants or of the Agents of the Company, and all and every the Dangers and Accidents of the Seas, Rivers and Steam Navigation, of whatever nature or kind, are excepted.

2. Steamer to have leave to deviate from any advertised route and to touch and stay at other Ports or places (although in a contrary direction to, or out of, or beyond, the ordinary or usual route to the port of discharge) once or oftener, in any order, backwards or forwards, for loading and/or discharging passengers and/or cargo and/or mails, or for any purpose of what kind soever, also to tow and assist vessels in all situations and to sail with or without Pilots.

Freight
£1075 1 9

payable at
MEL-
BOURNE

Freight, if pay-
able at desti-
nation in
America, to
be at the
rate of \$5.00
to the £1.

3. The Company does not guarantee the time of ship's arrival at or departure from any port, and will not hold itself responsible for the loss of or damage to goods lying on any wharf awaiting shipment, or after discharge from vessel's tackle. Consignees or their assigns must be ready to take delivery of goods as soon as the ship is ready to discharge them, otherwise the Company shall be at liberty to land or warehouse the goods, or discharge them into a store, ship, or hulk, or into lighters, or on a wharf, as customary, at the Shipper's risk and expense. Sorting charges, if any, to be borne

by consignee. Goods for any roadstead only received on the understanding that if deemed necessary by the Master to proceed on voyage without discharging the whole or any part of said goods, such overcarrying to be at the Shipper's risk.

4. The ship will not be responsible for correct delivery unless each package is distinctly, correctly and permanently marked by the Shipper before shipment, with a mark and number of address, and also with the name of the Port of delivery. [49]

5. The Company are to be at liberty to carry the goods to their Port of destination, by the within mentioned or other steamer or steamers, ship or ships, either belonging to themselves, or to the other persons, proceeding by and route, and whether directly or indirectly to such port, and in so doing to carry the goods beyond their Port of destination, and to tranship or land or store the goods either on shore or afloat and re-ship and forward the same at the Company's expense but at Shipper's risk.

6. The Company will not be responsible under any circumstances if goods or any portion of them be missed or lost, unless a claim be made on account thereof within seven days from the date the goods were landed, or should have been landed, if they prove missing, and it is agreed, that in settlement of any claim for loss of or damage to the goods, such claim shall be restricted to the cash value of the goods at the Port of discharge at the date of discharge, provided such value does not exceed the cash value at Shipping Port at the date of shipment

IMPORTANT:

Shippers consigning Goods or Merchandise "To Order," must, in order to avoid delay and expense at destination, indicate on the Captain's copy of This Bill of Lading (or by sealed cover addressed to the Company's Agent at San Francisco, attached to the Captain's copy of this Bill of Lading) the Person or Firm to be notified on arrival of the goods at destination.

with actual costs added, and in case of such excess to such last-mentioned cash value and costs.

7. Weight, measure, quality, contents and value unknown. The Company shall not be liable for rust, leakage, shrinkage, evaporation, explosion, stains, heat, sweat, decay, torn wrappers, broken cords or hoops; breakages of glass, chinaware, earthenware, stoves, grates, or any kind of cast iron packages, or other goods of a brittle or fragile nature, from whatsoever cause arising; loss or damage arising from insufficiency in packing or in strength of packages; illegibility, insufficiency, or obliterations of marks or numbers, the injurious effects of other goods, effects of climates, or heat of holds; risk of craft, or transshipment; effects of coaling on the voyage, or for the condition of re-exported or re-packed goods, or for the inside packages of tea, or for loss of specie, bullion, bank-notes, bonds, gold, silver, jewellery, watches, clocks, precious stones, precious metals, securities for money, paintings, sculptures, or other works of art, or any property of special value; nor beyond the value of £5 per cubic foot, nor exceeding £50 for any one package unless the value thereof shall have been declared at time of shipment and the Bill of Lading signed with a declaration of the nature and value of the goods appearing thereon, and extra freight in respect of same agreed upon and paid; nor for loss, injury or detention to packages intended for different Consignees, but made up into one package, unless the contents and

value of each separate package be given before shipment, and freight paid accordingly; an untrue declaration of the contents and value shall release the Company from all responsibility.

8. Live stock to be carried on deck or below at ship's option and at the sole risk of Shippers. The company will not be accountable for mortality or accidents of any kind in shipping or landing of stock. Freight on any kind of live stock to be in every instance according to the number shipped.

9. Fruit, shrubs, trees, meats, game, oysters, vegetables, and all kinds of perishable property to be carried on deck or below at Shipper's risk. Oils and all other liquids at Shipper's risk of leakage, unless caused by improper stowage. [50]

10. All cargoes liable to damage other cargo by reason of smell, risk of fire, explosion or other reason, except that of leakage or sweat, to be carried on deck at risk of Shipper.

11. If chemicals or other goods of a dangerous nature are shipped without being declared on Bill of Lading and specially arranged for, they may be thrown overboard and the shippers of such goods will be liable not only to the penalties imposed by Statute, but also for damages sustained in consequence of such shipment, either to persons, ship or cargo.

12. When, owing to bad weather, the exigencies of the Mail Service, or other cause, the goods cannot be safely shipped at the port of shipment or landed at the port of destination within the

time allotted for stoppage at such Port, the Company will not be responsible for any loss or damage caused by failure to ship or land the said goods or delay in shipment or landing thereof, and reserves to itself the right to convey any goods not landed to the next port on the voyage or to the final Port of call, to be returned thence at the first available opportunity.

13. The Company will not be responsible for overcarriage or landing of cargo at wrong Port from whatever cause, but will remedy same by first available opportunity.

14. Room at Ports of Transhipment is not guaranteed.

15. In case of quarantine the goods may be discharged into quarantine depot, hulk or other vessel, as required for the ship's despatch. Quarantine expenses upon the goods, of whatsoever nature or kind, shall be borne by the Shippers or Consignees.

16. Where lighterage, railage, etc., is incurred for transit of goods, either to or from the Company's steamers, the sole risk of same shall be borne by the Shippers, notwithstanding in some instances it may be the custom of the Company to defray the cost of such transit.

17. All fines and expenses or losses by detention of vessel or cargo, caused by incorrect or insufficient marking or by incorrect or incomplete description of weight, or any other particulars required by the Authorities at the Port of delivery, either upon the goods or the Bill of Lading, shall

be paid by the Shippers. The Company will not be responsible for losses which may arise in consequence of the laws of this or any other country.

18. Freight when payable by the Shipper is to be considered as earned, ship or goods lost or not lost. The Company shall have a lien on all goods for payment of freight and charges including back freight, dead freight, demurrage, forwarding charges, and charges for carriage to Port of shipment whether payable in advance or not and for all charges, expenses and damages for which the goods or the shippers or consignees thereof are liable under this Bill of Lading. The Company, may, at their discretion, and without being liable for any loss or damage thereby sustained, sell, at the expiration of 12 hours after arrival at the Port of consignment, any perishable goods on which the freight is unpaid. They may likewise, without any further notice than the herein contained, [51] at the expiration of 90 days from the time delivery of the goods should have been taken, sell such goods as are not of a perishable nature, or so much thereof as may be necessary to satisfy the said lien and retain from the proceeds of sale the freight and other charges due to the Company or to any other vessel in respect of the goods. Any such sale shall not prejudice or affect the Company's or other vessel's or her owner's right to recover from the person or persons liable to pay the same, the balance, if any, of freight and charges due in respect of the goods should the proceeds of sale thereof prove

insufficient to satisfy the said lien. Any surplus shall be payable to the Shipper.

19. The Company reserves the right to charge by weight, measurement or value, and to re-measure or re-weigh the goods at Port of destination, amending the charge for freight accordingly.

20. Perishable or other goods if landed with marks obliterated shall be accepted by consignee, if of the same description, in full satisfaction of any deficiency in the goods named in the Bill of Lading.

21. If required by the Company, one of the Bills of Lading must be presented or given up duly endorsed in exchange for the goods.

22. General Average to be adjusted according to York-Antwerp Rules, 1890.

IN WITNESS WHEREOF, the Master, Purser, or Agent of the said Steamship has signed two Bills of Lading, all of this tenor and date, one of which being accomplished, the others to stand void. Dated in Melbourne, this 12th day of March, 1917.

UNION STEAMSHIP CO. OF N. Z., LTD.

Per N. P. LAULSELL.

N. B.—Each clause in this Document shall be read with the following proviso:

PROVIDED that nothing herein contained shall relieve the Company from liability for loss or damage arising from harmful or improper condition of the ship's hold, or any other part of the ship in which goods are carried, or from negligence, fault, or failure in the proper loading, stowage, custody, care or delivery of the goods, or shall lessen,

weaken, or avoid any obligations of the Company to exercise due diligence, and to properly man, equip and supply the ship, to make and keep the ship seaworthy, and to make and keep the ship's hold refrigerating and cool chambers and all other parts of the ship where goods are carried, fit and safe for their reception, carriage and preservation, or to carefully handle and stow goods and to care for, preserve, and properly deliver them.

DANGEROUS GOODS: Merchants are cautioned against shipping (without being declared on Bill of Lading and specially arranged for with the Company) goods of a dangerous or damaging nature, as [52] by so doing they become responsible for all consequential damage, and also render themselves liable for penalties imposed by Statute.

This is the Bill of Lading mentioned and referred to in interrogatories Numbers two and three of Francis Archibald Drake and produced and shown to him at the time of his answering such interrogatories on Tuesday, the ninth day of December, 1919.

(Seal)

THOS. J. LEY,
Commissioner.

Sorting and Stacking Charges at San Francisco to be paid by Consignee.

GEORGE WILLS & CO., LIMITED,
H. HOOPER,
Manager.

[Endorsed]: No. 16,090. U. S. Dist. Court, Nor. Dist. Calif. Plff. Exhibit 1. Filed May 3, 1922. Maling, Clerk. [53]

Deposition of Mark Francis Shea, for Plaintiff.

The deposition of MARK FRANCIS SHEA was thereupon read in evidence as follows:

“Interrogatory No. 1. What is your name, residence and occupation?

Ans. Mark Francis Shea, Produce Merchant, Felinders St. Melbourne.

Interrogatory No. 2. Did your firm, in February and March, 1917, superintend the shipment of lot of onions on the Steamer ‘Waitotara’ consigned to George Wills & Sons, Limited, at San Francisco?

Ans. Yes.

Interrogatory No. 3. When did you commence to deliver these onions to the steamer?

Ans. Late in February, 1917.

Interrogatory No. 4. When was the delivery completed?

Ans. On March 7th, 1917.”

Mr. ZOOK.—If your Honor please, we object to that answer as immaterial in this matter, as to the date of delivery, except in the event that it is preliminary to proof of putting them on board within the contract time.

The COURT.—I don’t think I understand you.

Mr. ZOOK.—We object to the date of delivery to the steamer as immaterial, unless it is preliminary to the proof of shipment on board within the time provided by the contract. In other words, we will

endeavor to demonstrate to your Honor that a delivery to the steamer is not shipment, and that the contract has not been complied with by reason of failure to ship within the time.

The COURT.—Is there any question but what these were shipped on board the “Waitotara”?

Mr. ZOOK.—No, your Honor, but there is a question under the [54] clause of the contract requiring the onions to be shipped before the 10th of March, 1917, the bill of lading being dated March 12, 1917. Unless it is accompanied by further proof that they were put on board within the contract date, we think the bill of lading is immaterial.

The COURT.—I am inclined to think that it is admissible in response to the issue. The objection is overruled.

Mr. ZOOK.—Your Honor will allow us an exception.

The COURT.—If that means delivery aboard, of course that is a conclusion. Is the witness testifying to their being aboard the vessel?

Mr. HARWOOD.—Yes, your Honor.

The COURT.—Very well. I thought he said delivered to the steamer.

Mr. HARWOOD.—I understand that when goods are delivered to the steamer it means putting them on the steamer. That was the intention of the witness, and that was the intention of the interrogatory. These interrogatories were settled by the Court. That was the only purpose in asking the witness when they were delivered to the steamer.

According to the authorities, when goods are delivered to the steamer they are delivered on board.

The COURT.—I should think that would be true. A party is not permitted to put them on board.

Mr. ZOOK.—I am prepared to argue the question that delivery to the steamer is not equivalent to putting them on board. To prove shipment they must prove that the goods are on board the steamer within the contract time, and that “delivery to the steamer” is uncertain. I will call your Honor’s attention to a very leading Federal case.

The COURT.—I do not see the materiality of that consideration [55] here anyhow. There is no question but what they were shipped on this steamer. She did not sail on the 10th, but she sailed thereafter, and the goods were aboard of her.

Mr. ZOOK.—But the point that we make, and which we are prepared to argue and to cite authority upon is this, that the bill of lading is *prima facie* evidence of the date of the shipment.

The COURT.—What is the materiality of that in this controversy?

Mr. ZOOK.—One of the vital points in this case is whether or not under this contract there was a shipment effected from Australia by the steamer on March 10. Our claim is, first, that there is no proof of any shipment on any other date than the date of the bill of lading, March 12, two days later; that delivery to the steamer is not equivalent to shipment.

The COURT.—I don't see the materiality of that question in this case at all. There is materiality in the question of delivery. Of course, if the failure to deliver on the 10th instead of on the 12th, as recited in the bill of lading, appeared to be material, that is one thing; but where it does not, as in accordance with the statement here and the stipulation here, I don't see the consideration to be given to it.

Mr. ZOOK.—We have not stipulated as to that. We take the position as a broad proposition of law that time is of the essence of mercantile contracts of this nature.

The COURT.—Where time enters into the results at all, yes, that is undoubtedly so, but where it is a date which, under the circumstances, has been shown to be wholly immaterial, then I do not think it is of the essence.

Mr. ZOOK.—But the contract reads, "Shipment to be effected from Australia by steamer on the 10th of March, 1917." That is the effective date. Unless the shipment were made by March 10, [56] 1917, the contract is not complied with. That is the first breach. We claim a succession of breaches in this matter. We claim that delivery to the ship is not equivalent to putting on board. We would like to cite your Honor the cases upon that point.

The COURT.—I don't care anything about that now. This answer, as I understand it, is intended to mean that they shipped them on board the steamer on that date. If you can show that that is not what is intended, you may do so.

Mr. ZOOK.—If your Honor is of the opinion that delivery to the steamer is equivalent to shipment on board—

The COURT.—No, I am not saying that at all. This witness is saying that they went on board.

Mr. ZOOK.—No, your Honor.

Mr. HARWOOD.—That is what is intended. That was what was intended by the interrogatory, and I think that is what the witness intended.

The COURT.—It is not a question of what you think or what I think the witness intended; the meaning of the answer must be taken from the words used by the witness. Just read that.

Mr. HARWOOD.—“Q. When did you commence to deliver these onions to the steamer? A. Late in February, 1917. “Q. When was the delivery completed? A. On March 7, 1917.”

The COURT.—I misapprehended that. I thought he said they were completely on board the steamer at that time.

Mr. HARWOOD.—I think that is what he intended.

The COURT.—It is not what he intended, or what you intend, or what I intend, it is what the words import.

Mr. ZOOK.—We object to that testimony on the ground that the date of delivery to the steamer is immaterial, except as preliminary [57] to a showing of putting them on board within the contract date.

The COURT.—At this time, though, the matter is not objectionable.

Mr. ZOOK.—We will reserve the right to object to that later.

The COURT.—Very well.

“Interrogatory No. 5. Before the completion of the delivery of the onions to the Steamer, had you been informed by Union Steamship Company of New Zealand, Ltd., or by anyone else, that the ‘Waitotara’ would not sail direct to San Francisco?

Ans. No.

Interrogatory No. 6. Before the completion of the delivery of the onions to the steamer, had any one connected with the firm of H. Hecht & Co., to your knowledge, been informed that the ‘Waitotara’ would not sail direct to San Francisco.

Ans. No.

Interrogatory No. 7. When did you first learn that the ‘Waitotara’ would proceed to San Francisco via Vancouver?

Ans. I did not know until after the boat had actually sailed.

Interrogatory No. 8. At or before the time of the delivery of the onions to the Steamer, did you know that the ‘Waitotara’ would proceed to San Francisco via Vancouver?

Ans. No.

Interrogatory No. 9. To your knowledge, at or before the time of the delivery of the onions to the steamer, did anyone connected with H. Hecht & Co., know that the ‘Waitotara’ would proceed to San Francisco via Vancouver?

Ans. No. [58]

Interrogatory No. 10. At the time of the delivery of said onions to the 'Waitotara,' what was the condition of the onions?

Ans. Good.

Interrogatory No. 11. At the time of the delivery of said onions to the 'Waitotara,' what was the quality of said onions?

Ans. Best quality Australian brown onions."

Mr. HARWOOD.—We offer in evidence the certificate as to the quality of the onions. I do not think it is material, because they were not entitled to a certificate unless they took the onions, but nevertheless it may be material. We made an offer in writing to deliver the certificate at the same time we offered to deliver the onions, but they refused.

The COURT.—Has the certificate any legal significance?

Mr. HARWOOD.—It is called for by the contract.

The COURT.—What does the contract say on that?

Mr. HARWOOD.—Quality of onions delivered to steamer in Australia to be guaranteed and a certificate for same will be provided.

Mr. ZOOK.—We object to the certificate on the ground that it has no connection with the onions in this case. That is a certificate as to a 4400 packages Vict. onions.

Mr. HARWOOD.—We can prove by other evidence that the 4400 packages included this shipment.

Mr. ZOOK.—We are not aware of any identity between Viet. onions and Australian brown onions.

The COURT.—You will have to lay a foundation. This does not seem to meet your necessities.

Mr. HARWOOD.—I will call Mr. Anderson to the stand.

Testimony of A. H. Anderson, for Plaintiff.

A. H. ANDERSON was thereupon called as a witness for the [59] plaintiff, and after being duly sworn, testified as follows:

Mr. HARWOOD.—Q. You are the manager for California of the plaintiff in this case, are you?

A. I am.

Q. You were the assistant manager in 1917?

A. I was.

Q. At the time of the shipment of these onions?

A. Yes.

Q. I refer you to the bill of lading which I offered in evidence, which calls for 4428 crates of onions; I also call your attention to the inspector's certificate, which refers to 4400 packages of onions shipped according to the certificate on the "Waitotara," and consigned to your firm, and I ask you if your firm had any onions aboard the "Waitotara" except the onions covered by the bill of lading?

A. No, we did not.

Q. From whom did you receive this certificate?

A. From George Wills & Co., limited, attached to the shipping documents.

Q. Was it attached to the bill of lading when you received it? A. Yes.

(Testimony of A. H. Anderson.)

Q. It was attached to the bill of lading?

A. Yes, with all the shipping documents attached.

Q. And this is the bill of lading? A. Yes.

Mr. HARWOOD.—I offer this in evidence.

Mr. ZOOK.—We object to it as immaterial, irrelevant and incompetent, and there is no identity between the onions shown there in that certificate and the particular onions involved in this case, which are Australian brown onions.

The COURT.—I think the objection is good, Mr. Harwood. You have not established identity between the onions involved in this certificate and the shipment involved here.

Mr. HARWOOD.—I thought I had shown it, your Honor.

The COURT.—No, you have simply shown by the witness that there were no other onions received by them on the “Waitotara,” [60] excepting these, but that does not show that this certificate had reference to brown Australian onions.

Mr. HARWOOD.—The contract says, the quality of onions to be delivered to the steamer to be guaranteed and certificate for same to be provided. It is very indefinite as to what the certificate means. I don't know that it is necessary, according to the contract for shipment, to describe the onions as brown Australian, if it describes them as onions and refers to the very onions described in the bill of lading.

The COURT.—You mean that it is not necessary for the certificate to show what class of onions they were?

(Testimony of A. H. Anderson.)

Mr. HARWOOD.—As long as it guarantees the quality of them, it is not necessary to describe them fully as brown Australian onions. It says: “Quality of the onions delivered to steamer in Australia to be guaranteed, and a certificate for same will be provided.”

The COURT.—What is included in the term “quality”? That is a very material thing. Here is a contract calling for a certain specified character of onion.

Mr. HARWOOD.—This certificate says, the onions are in good order and condition at time of inspection.

The COURT.—But the question is whether it relates to the onions that are involved here. It certainly relates to a different quantity, doesn’t it? You did not receive any such quantity as 4428 crates.

Mr. HARWOOD.—The amount is practically the same, your Honor. It is 4400 in the certificate, and 4428 in the bill of lading.

The COURT.—Oh, is it?

Mr. HARWOOD.—Yes, your Honor.

The COURT.—I think I will let the certificate go in.

Mr. HARWOOD.—We ask that it be marked Plaintiff’s Exhibit No. 2. [61]

Said certificate was thereupon received and read in evidence, marked Plaintiff’s Exhibit No. 2, and was and is in words and figures following, to wit: [62]

Plaintiff's Exhibit No. 2.

No. A 15013.

G.

R.

Department of Agriculture.

Victoria.

INSPECTOR'S CERTIFICATE.

Melbourne, Mch. 8th, 1917.

I hereby certify that I have inspected the under-mentioned onions consigned by G. Wills & Co. of Sydney to order of San Francisco per "S. S. Waitotara" and have found them to be, to the best of my knowledge, clean and free from ~~Irish Blight~~ in any state of development and from any other onion disease proclaimed. In good order and condition at time of inspection.

Goods.	Pkgs.	Name and Address of Grower.	Marks.
Viet Onions	4400		G W S F

The cases containing the above-mentioned onions are new.

FIRST QUALITY.

H. E. GRASS,
Inspector.

[Endorsed]: No. 16,090. U. S. Dist. Court, Nor. Dist. Calif. Plff. Exhibit 2. Filed May 3d, 1922. Maling, Clerk. [63]

Plaintiff thereupon rested.

Thereupon the defendants moved for a nonsuit upon the following grounds:

First, that it affirmatively appears from plaintiff's evidence that the goods were not put on board the vessel before the 10th day of March, as called for by the contract. That time was of the essence

of the contract, under the general mercantile law, a specific time having been provided for delivery, and the general presumption being that time is of the essence in mercantile contracts between foreign ports.

Second, upon the ground that it affirmatively appears from the evidence in the case that the vessel did not leave Australia until after the 16th day of March, 1917, and that the departure from Australia at such time is not an effective shipment such as is called for by the contract.

Third, it affirmatively appears from the contract that the contract of the plaintiff was to ship these onions and to deliver them duty paid on the dock in San Francisco; that it affirmatively appears that the onions arrived on May 19, some 69 days from Australia, and by way of Melbourne, Sidney, Wellington, Vancouver, which, as your Honor will take judicial notice of, is a considerable deviation from the direct route from Australia to San Francisco; that the duty being upon the plaintiffs to deliver, their duty was to choose a reasonable method of delivery, and that such method of delivery affirmatively appears from the plaintiff's evidence not to have been a reasonable method of carrying out their contract.

(Thereupon counsel argued the motion for nonsuit.)

The COURT.—I am very much inclined to the view, under the arguments which have been had, Mr. Harwood, that you have not shown [64] an effective shipment of these goods in accordance

with the contract, that is, having the nature of the goods in view and the stipulations in the contract. I do not know what other meaning to give to the words "to be effected" in connection with the words used there than to be accomplished. You have a stipulation there that the shipment should be effected from Australia. I am always reluctant to grant nonsuits. I always like to see what there is in the merits. When you are dealing with a written contract, however, you have to bring yourself within its terms if those terms inhere in its essential requisites. This certainly does.

Mr. HARWOOD.—If that language in that contract bears the construction contended for, and which your Honor seems inclined to hold, there will be no sense in going on with the trial.

The COURT.—I think that it would be better—I am inclined to think that unless you had some evidence which would tend to exculpate you in rebuttal from the situation which you are now in, that even if I were to deny the motion now the defendants would have a right, and in order to avail themselves of the question involved they would be called upon to renew the motion upon the completion of the evidence. I am satisfied that standing on the evidence as it is now, I would be called upon to sustain the motion. I might as well do it now, and if this case is reviewed and the Circuit Court of Appeals should take a different view, then the evidence, being substantially all in the depositions and in the stipulations, would still be before us, there would be no loss in that regard.

Let the motion for nonsuit be granted.

Said order of the Court, granting said motion for a nonsuit, was and is in words and figures following, to wit: [65]

“Defendants moved for a nonsuit on the grounds stated and after arguments the motion was submitted and being fully considered it was ordered that said motion be and is hereby granted and that a judgment of nonsuit, with costs to the defendants, be entered herein; to which ruling the plaintiff duly excepted.”

To the said order, judgment and entry of the Court, granting said motion for a nonsuit, council for plaintiff then and there duly excepted.

EXCEPTION No. 8.

Thereupon, to wit, on the 3d day of May, 1922, the Court gave and rendered its judgment herein in favor of the defendants and against the plaintiff, which said judgment is a part of the judgment-roll herein.

To the said judgment, the plaintiff duly excepted.

EXCEPTION No. 9.

ASSIGNMENTS OF ERROR.

The plaintiff now assigns as error to be used upon its appeal from said judgment or order granting said nonsuit, and on its appeal from the judgment herein, the following, to wit:

ERRORS OF LAW.

That the Court erred in each of its rulings striking out evidence over the objection and exception of plaintiff, as specified in Exceptions Nos. 1, 2, 3, 4, 5, 6, and 7.

That the Court erred in granting defendants' motion for a nonsuit as specified in Exception No. 8 set forth in the foregoing [66] bill of exceptions.

That the Court erred in rendering judgment in favor of the defendants and against plaintiff, as specified in Exception No. 9.

And now, within the time allowed by law, plaintiff presents this its bill of exceptions to be used upon appeal from said order or judgment of nonsuit, and on its appeal from said judgment in favor of defendants and against plaintiff.

Dated: May 12th, 1922.

ALFRED J. HARWOOD.

Attorney for Plaintiff.

Stipulation Re Bill of Exceptions.

IT IS HEREBY STIPULATED AND AGREED that the foregoing Bill of Exceptions is true and correct and may be settled, certified and allowed by the Judge.

Dated: May 12th, 1922.

ALFRED J. HARWOOD,

Attorney for Plaintiff.

CHARLES W. SLACK,

EDGAR T. ZOOK and

ALFRED T. CLUFF,

Attorneys for Defendants.

Certificate of Judge to Bill of Exceptions.

The foregoing bill of exceptions is hereby settled and allowed and certified to be a true bill of exceptions this 25th day of May, 1922.

WM. C. VAN FLEET,
Judge. [67]

Service of the within proposed bill of exceptions is hereby admitted this 12th day of May 1922.

EDGAR T. ZOOK,
CHARLES W. SLACK and
Attorneys for Defendants.

[Endorsed]: Filed May 25, 1922. Walter B. Maling, Clerk. [68]

(Title of Court and Cause.)

Petition for Writ of Error.

To the Honorable WILLIAM C. VAN FLEET,
Judge of the Above-entitled Court, and to the
Judge or Judges of said District Court:

Now comes the above-named plaintiff, George Wills & Sons, Limited, a corporation, by Alfred J. Harwood, its attorney and says:

That on or about the 3d day of May, 1922, this Court entered a judgment herein, in favor of defendants and against plaintiff, in which judgment and the proceedings prior thereunto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors, which is filed with this petition:

WHEREFORE plaintiff prays that a writ of error may issue in its behalf to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 26th day of May, 1922.

ALFRED J. HARWOOD,
Attorney for Plaintiff.

[Endorsed]: Filed May 26, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [69]

(Title of Court and Cause.)

Assignment of Errors.

Now comes the above-named plaintiff, George Wills & Sons, Limited, a corporation, and in connection with its petition for a writ of error makes the following assignment of errors, which it avers were committed by the Court upon the trial of this cause and in the rendition of the judgment against plaintiff appearing upon the record herein, to wit:

I.

The Court erred in striking out part of the answer of the witness Francis Archibald Drake upon the ground that it was hearsay (as appears in exception No. 1 in plaintiff's bill of exceptions herein). The interrogatory and the answer thereto, a part

of which was stricken out, as aforesaid, are as follows:

“Interrogatory No. 6. At the time this space was booked, for what voyage was the ‘Waitotara’ advertised or Scheduled?

Ans. Our advice was that the ‘Waitotara’ was engaged to sail for San Francisco, and we knew of no extraordinary deviation.”

The part of said answer stricken out by the Court, as aforesaid, was the words “and we knew of no extraordinary deviation.”

II.

The Court erred in striking out the answer of the witness Francis Archibald Drake (as appears in Exception No. 2 in plaintiff’s bill of exceptions herein), on the ground that the certificate referred to in the contract between the parties spoke for itself. The interrogatory and the answer thereto which was stricken out are as follows: [70]

“Interrogatory No. 22. At the time of the delivery of said onions to the ‘Waitotara,’ what was the condition of the onions?

Ans. First class according to Government Grader’s Certificate.”

III.

The Court erred in striking out the answer of the witness Francis Archibald Drake (as appears in Exception No. 3 in plaintiff’s bill of exception herein), on the same ground on which the answer to Interrogatory No. 22 was stricken out. The interrogatory and the answer thereto which was stricken out are as follows:

“Interrogatory No. 23. At the time of the delivery of said onions to the ‘Waitotara,’ what was the quality of said onions?”

Ans. Brown Spanish, and also see No. 22.”

IV.

The Court erred in striking out part of the answer of the witness Francis Archibald Drake (as appears in Exception No 4 in the plaintiff’s bill of exceptions herein), on the ground that said part of said answer was the conclusion of the witness. The interrogatory and the answer thereto, a part of which was stricken out, as aforesaid, are as follows:

“Cross-Interrogatory No. 4. Do you understand by ‘sailing direct to San Francisco’ that the steamer would sail from Melbourne to San Francisco in the most direct line compatible with the proper navigation of the steamer and without touching at any intermediate or other ports on the way?”

Ans. Yes, that would be my understanding, but the shipping agents could divert under Bill of Lading clauses, notwithstanding a statement that a vessel was a direct steamer.”

The part of said answer which was so stricken out was all of said answer after the word “understanding.” [71]

V.

The Court erred in striking out a part of the answer of the witness Francis Archibald Drake (as appears in Exception No. 5 in plaintiff’s bill of exceptions herein), on the ground that said part of said answer was not responsive. The interrogatory

and answer thereto, a part of which was stricken out, as aforesaid, are as follows:

“Cross-Interrogatory No. 6. Did you make any inquiry of any of the officials of the Union Steamship Company, Ltd., before you commenced to deliver the onions covered by the bill of lading mentioned in Interrogatory No. 2 as to the time of departure or route to be followed by the ‘Waitotara’?

Ans. Yes, I did make inquiry and was informed that the ‘Waitotara’ would sail on the 10th March from Melbourne to San Francisco as a direct steamer, which information it was necessary for me to ascertain in the first negotiating for the business.”

The part of said answer which was so stricken out was all of said answer after the word “steamer.”

VI.

The Court erred in striking out part of the answer of the witness Francis Archibald Drake (as appears in Exception No. 6 in plaintiff’s bill of exceptions herein), on the ground that it was argumentative and not responsive. The interrogatory and answer thereto, a part of which was stricken out, are as follows:

“Cross-Interrogatory No. 7. Did you make any such inquiry prior to the completion of delivery of the onions to the steamer?

Ans. No direct inquiry was made to the company as to any alteration in the date of sailing between the date that the space was booked and the date of the completion of the delivery

of the onions to this steamer, for having booked space on her we naturally did not think this was necessary, for it was fair to assume that as interested parties, the company would have advised us, without [72] application to them, if a serious alteration in the date of sailing or in the sailing route was made. We were never informed by the Company of any such alteration.”

The part of said answer which was so stricken out was that part thereof reading as follows:

“having booked space on her we naturally did not think this was necessary, for it was fair to assume that as interested parties, the company would advise us, without application to them, if a serious alteration in the date of sailing or in the sailing date was made.”

VII.

The Court erred in striking out the answer of the witness Francis Archibald Drake to Cross-Interrogatory No. 10, on the ground that the answer was not responsive to the question (as appears in Exception No. 7 in the plaintiff's bill of exceptions herein). The said interrogatory and the answer thereto, so stricken out, are as follows:

“Cross-Interrogatory No. 10. Are not the sailing dates and arrivals of the Oceanic Line Steamers and the route to be followed by them on each voyage advertised a year or more in advance of their sailing dates?

Ans. Whilst dates might be fixed as far as twelve months ahead no booking for space for

anything like such a time would be made, but this is altogether outside the question, and has nothing whatever to do with 'Waitotara' sailing which was a specific instance."

VIII.

The Court erred in granting defendants' motion for a nonsuit (as appears in Exception No. 8 in the plaintiff's bill of exceptions herein). Said motion for a nonsuit was made by defendants on the following grounds:

"First, that it affirmatively appears from plaintiff's evidence that the goods were not put on board the vessel before the 10th day [73] of March, as called for by the contract. That time was of the essence of the contract, under the general mercantile law, a specific time having been provided for delivery, and the general presumption being that time is of the essence in mercantile contracts between foreign ports.

Second, upon the ground that it affirmatively appears from the evidence in the case that the vessel did not leave Australia until after the 16th day of March, 1917, and that the departure from Australia at such time is not an effective shipment such as is called for by the contract.

Third, it affirmatively appears from the contract that the contract of the plaintiff was to ship these onions and to deliver them duty paid on the dock in San Francisco; that it affirmatively appears that the onions arrived on May 19, some 69 days from Australia, and by way of Melbourne, Sidney, Wellington, Vancouver,

which, as your Honor will take judicial notice of, is a considerable deviation from the direct route from Australia to San Francisco; that the duty being upon the plaintiffs to deliver, their duty was to choose a reasonable method of delivery, and that such method of delivery affirmatively appears from the plaintiff's evidence not to have been a reasonable method of carrying out their contract."

IX.

The Court erred in giving and rendering its judgment herein in favor of the defendants and against the plaintiff (as appears in Exception No. 9, in the plaintiff's bill of exceptions herein). Said judgment is a part of the judgment-roll herein.

WHEREFORE said plaintiff, George Wills & Sons, Limited, a corporation, prays that the judgment of said District Court may be reversed and that said plaintiff may have judgment against said defendants as prayed in its complaint herein.

ALFRED J. HARWOOD,
Attorney for George Wills & Sons, Limited, a Corporation, Plaintiff in Error.

[Endorsed]: Filed May 26, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [74]

(Title of Court and Cause.)

**Order Allowing Writ of Error and Fixing Amount
of Bond.**

In this 26th day of May, 1922, came the above-named George Wills & Sons, Limited, a corporation, plaintiff herein, by Alfred J. Harwood, its attorney, and filed herein and presented to this Court, its petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by it, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises;

ON CONSIDERATION WHEREOF, this Court does allow the writ of error, upon the said plaintiff giving a bond, according to law, in the sum of Four Hundred Dollars, lawful money of the United States, which said bond shall operate as a *superseas* bond.

Dated at San Francisco, this 26th day of May, 1922.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: Filed May 27, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [75]

(Title of Court and Cause.)

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That, whereas, lately in a District Court of the United States, in and for the Northern District of California, Second Division, in a suit depending in said court between the George Wills & Sons, Limited, a corporation, as plaintiff, and William R. Larzelere and Joseph J. Sweeney, Copartners doing business under the firm name of Larzelere, Sweeney Company, as defendants, a judgment was rendered against the said George Wills & Sons, Limited, a corporation, for costs and disbursements in the sum of Forty Dollars and Fifty-five cents (\$40.55), and the said George Wills & Sons, Limited, a corporation, having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court, to reverse the judgment in the aforesaid suit and a citation having issued directed to said William R. Larzelere and Joseph J. Sweeney, copartners doing business under the firm name of Larzelere, Sweeney Company, citing and admonishing them to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, State of California, in said court, on the —— day of June, 1922.

NOW, THEREFORE, in consideration of the premises and of such writ of error, the undersigned sureties are held and firmly bound unto the above-named defendants, William R. Larzelere and Joseph

J. Sweeney, copartners doing business under the firm name of Larzelere, Sweeney Company, in the full and just sum of Four Hundred Dollars(\$400.00), lawful money of the United States, to be paid to said defendants, William R. Larzelere and Joseph J. Sweeney, [76] copartners doing business under the firm name of Larzelere, Sweeney Company, or their assigns, for which payment well and truly to be made, the undersigned bind themselves by these presents.

The condition of the above obligation is such that if the said George Wills & Sons, Limited, a corporation, the plaintiff in said action, and plaintiff in error aforesaid, shall prosecute said writ of error to effect and answer all damages and costs that may be awarded against it if it fails to make its said plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF the said sureties have hereunto set their hands and seals this 26th day of May, 1922.

A. H. ANDERSON. (Seal)

H. L. RYAN. (Seal)

The foregoing sureties are hereby approved.

CHARLES W. SLACK and

EDGAR T. ZOOK,

Attorneys for Defendants in Error.

Bond approved.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed May, 27, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [77]

(Title of Court and Cause.)

Affidavit of Service of Citation on Writ of Error.

State of California,

City and County of San Francisco,—ss.

Harold A. Wyatt, being duly sworn, deposes and says:

That he is and was at all times herein mentioned a citizen of the United States and a resident of the State of California, over the age of eighteen years.

That on the 6th day of June, 1922, he served a copy of the original citation on writ of error, now on file in the office of the clerk of the above-entitled court, on William R. Larzelere, by delivering to and leaving with the said William R. Larzelere, personally, in the City and County of San Francisco, State of California, the said copy of the citation referred to.

That on the 9th day of June, 1922, he served a copy of the above-mentioned citation on Joseph J. Sweeney, by delivering to and leaving with the said Joseph J. Sweeney personally, in the City and County of San Francisco, State of California, the said copy of the citation heretofore referred to.

HAROLD A. WYATT.

Subscribed and sworn to before me this 12th day of June, 1922.

[Seal]

E. M. CLARK,

Notary Public of the State of California, in and for the City and County of San Francisco.

[Endorsed]: Filed Jun. 13, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [78]

(Title of Court and Cause.)

Praeipie for Record on Writ of Error.

To the Clerk of the Above-entitled Court:

Please prepare and forward to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, copies of the following papers on plaintiff's writ of error herein, viz.:

1. Judgment-roll.
2. Plaintiff's bill of exceptions.
3. Petition for writ of error.
4. Assignment of errors.
5. Order allowing writ of error and fixing amount of bond.
6. Writ of error.
7. Bond on writ of error.
8. Citation on writ of error.

Dated: May 31st, 1922.

ALFRED J. HARWOOD,
Attorney for Plaintiff.

[Endorsed]: Filed Jun. 1, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [79]

(Title of Court and Cause.)

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing seventy-nine (79) pages, numbered from 1 to 79, inclusive, to be full, true and correct copies of the record and

proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$35.30; that said amount was paid by the plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 21st day of July, A. D. 1922.

[Seal]

WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [80]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

United States of America,
Ninth Judicial Circuit,—ss.

Writ of Error.

The President of the United States of America:
To the Honorable the Judge of the Southern
Division of the District Court of the United
States for the Northern District of California,
Second Division, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said District Court, before you, at the

March, 1922, term thereof, wherein George Wills & Sons, Limited, a corporation, is plaintiff in error, and William R. Larzelere and Joseph J. Sweeney, copartners doing business under the firm name of Larzelere, Sweeney Company, are defendants in error, and wherein George Wills & Sons, Limited, a corporation, was plaintiff and said William R. Larzelere and Joseph J. Sweeney, copartners doing business under the firm name of Larzelere, Sweeney Company, were defendants, a manifest error has happened, to the great damage of the said George Wills & Sons, Limited, a corporation, the plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same [81] at the City and County of San Francisco, in the State of California, where said court is sitting, on the 26th day of June, 1922, and within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the

laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States, the 27th day of May, A. D. 1922.

[Seal]

WALTER B. MALING,
Clerk of the District Court of the United States
for the Northern District of California, Second
Division.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,
United States District Judge.

Due service and receipt of a copy of the within writ of error is hereby admitted ths 27th day of May, 1922.

CHARLES W. SLACK,
EDGAR T. ZOOK,

Attorneys for Defendants and Defendants in Error.

[82]

[Endorsed]: No. 16,090. In the United States Circuit Court of Appeals for the Ninth Circuit. Writ of Error. Filed Jun. 3, 1922. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[82½]

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mentioned is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court:

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [83]

Citation on Writ of Error.

United States of America,
Northern District of California,—ss.

The President of the United States to William R. Larzelere and Joseph J. Sweeney, Copartners Doing Business Under the Firm Name of Larzelere, Sweeney Company, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the 26th day of June, 1922, being

within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Southern Division of the District Court of the United States for the Northern District of California, Second Division, wherein George Wills & Sons, Limited, a corporation, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said George Wills & Sons, Limited, a corporation, plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WM. C. VAN FLEET, United States District Judge for the Northern District of California, this 27th day of May, 1922.

WM. C. VAN FLEET,
United States District Judge.

Due service and receipt of a copy of the within citation on writ of error is hereby admitted this 29th day of May, 1922.

CHARLES W. SLACK,
EDGAR T. ZOOK,

Attorneys for Defendants and Defendants in Error.

[84]

The undersigned defendants named in the within citation hereby admit due service of said citation this 31st day of May, 1922.

_____,
_____,
Copartners Doing Business Under the Firm Name
of Larzelere Sweeney Company.

[Endorsed]: No. 16,090. Citation on Writ of Error. Filed Jun. 5, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3898. United States Circuit Court of Appeals for the Ninth Circuit. George Wills & Sons, Limited, a Corporation, Plaintiff in Error, vs. William R. Larzelere and Joseph J. Sweeney, Copartners Doing Business Under the Firm Name of Larzelere, Sweeney Company, Defendants in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed July 26, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit.

GEORGE WILLS & SONS, LTD., a Corporation,
Plaintiff in Error,

vs.

WILLIAM R. LARZELERE et al.,
Defendants in Error.

Order Extending Time to and Including July 26, 1922, to File Record and Docket Cause.

Good cause being shown, it is hereby ordered that the plaintiff in error may have to and including July 26, 1922, within which to file the record on writ of error and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated June 26, 1922.

W. H. HUNT,
U. S. Circuit Judge.

[Endorsed]: No. 3898. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including July 26, 1922, to File Record and Docket Cause. Filed Jun. 26, 1922. F. D. Monckton, Clerk. Refiled Jul. 16, 1922. F. D. Monckton, Clerk.

San Francisco Law Library.

No. 3898 2

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

GEORGE WILLS & SONS, LIMITED

(a corporation),

Plaintiff in Error,

vs.

WILLIAM R. LARZELERE and JOSEPH J.

SWEENEY, copartners doing business

under the firm name of LARZELERE,

SWEENEY COMPANY,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

ALFRED J. HARWOOD,

Attorney for Plaintiff in Error.

San Francisco Law Library.

FILED

FEB 11 1902

W.D. MOORE

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No. 3898

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE WILLS & SONS, LIMITED

(a corporation),

Plaintiff in Error,

VS.

WILLIAM R. LARZELERE and JOSEPH J.

SWEENEY, copartners doing business

under the firm name of LARZELERE,

SWEENEY COMPANY,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This writ of error is prosecuted to review the judgment of the District Court granting the defendants' motion for a non-suit.

The action is brought by George Wills & Sons, Limited, the plaintiff in error, against the defendants in error for damages for the breach of a written contract between the parties for the purchase and sale of 75 tons of Australian onions. The complaint was amended. The re-engrossed amended complaint is printed in the Transcript at pages 29, *et*

seq. The contract, which is set forth in full in the complaint, is as follows:

“San Francisco, California, U. S. A.
Feb. 19, 1917.

Larzelere, Sweeney Co.,
San Francisco.

Dear Sirs:

We hereby confirm the sale to you, through Mr. M. J. O'Reilly, of 75 (Seventy-five) tons of 2240 lbs. Crated Brown Australian Onions at the price of 4 (four) cents U. S. currency per pound, landed on the dock, duty paid, San Francisco.

Shipment to be effected from Australia by steamer on the 10th of March, 1917.

Quality of the Onions delivered to the steamer in Australia to be guaranteed and a Certificate for same will be provided.

The Onions to be paid for by you in Cash on arrival in San Francisco.

This Contract is of course subject to the usual clause exempting us from claims of any nature, through nonfulfillment caused by conditions, over which we have no control.

Yours faithfully,

For George Wills & Sons, Ltd.

A. H. Anderson,
Manager.

Accepted:

Larzelere Sweeney Co.”

(Amended Complaint Re-engrossed, Tr. pg. 30.)

With reference to the performance of the contract by George Wills & Sons, Limited, the complaint contains the following allegations:

That on the 26th day of February, 1916, plaintiff's agents in Australia booked and reserved space for the shipment, on the steamer “Wattotara” of the Union Steamship Company of New

Zealand, of said 75 tons of crated brown Australian onions from Melbourne, Australia, to San Francisco; that prior to the 10th day of March, 1917, at Melbourne, Australia, plaintiff caused said 75 tons of crated brown Australian onions to be delivered to the Union Steamship Company of New Zealand, Limited, the owners of the steamer "Wattotara," for shipment by said steamer to San Francisco. That when said space was reserved and said onions delivered, as aforesaid, said steamer was listed and scheduled to sail on March 10, 1917, direct from Melbourne to San Francisco. That through no fault of plaintiff said steamer did not proceed direct from Melbourne to San Francisco, but proceeded to San Francisco by way of Vancouver, British Columbia; that plaintiff had no control over the sailing time of said steamer, nor did plaintiff have any control over the route which said steamer should take in sailing from Melbourne to San Francisco; that the time of the departure of said steamer from Melbourne and the route taken by said steamer were determined and fixed by the said owners of said steamer. That the bill of lading covering said shipment, as well as all other bills of lading, issued by the owners of said steamer, contained the following provision:

"2. Steamer to have leave to deviate from any advertised route and to touch and stay at other Ports or places (although in a contrary direction to, or out of, or beyond, the ordinary or usual route to the port of discharge) once or oftener, in any order, backwards or forwards, for loading and/or discharging passengers and/or cargo and/or mails, or for any purpose of what kind soever, also to tow and assist vessels in all situations and to sail with or without Pilots."

That the bills of lading issued by all steamship owners operating steamers between Australian

ports and ports in the United States of America contain provisions substantially similar to the said provision hereinabove set forth. That neither plaintiff nor its agents had knowledge, prior to March 14, 1917, that said steamer "Wattotara" would proceed to San Francisco by way of Vancouver; that at all times prior to said 14th day of March, 1917, plaintiff and its agents believed that said steamer would sail direct from Melbourne to San Francisco. That no steamer other than said "Wattotara" sailed from Melbourne to San Francisco between the 9th day of March, 1917, and the 17th day of March, 1917. That at the time of the delivery of said onions to the steamer in Australia, as aforesaid, said onions were of good quality and the said onions were then in good order and condition. That said onions were loaded on board said steamer before the 10th of March, 1917.

(Paragraph V of Re-engrossed Amended Complaint, Tr. pg. 31-33.)

The answer of the defendants denied the foregoing allegations, the denial being based on lack of information or belief. (Tr. pg. 18.)

The complaint further alleged that on May 19, 1917, the onions arrived at San Francisco; that plaintiff thereupon notified the defendant of their arrival and caused them to be landed on the dock, and the duty thereon to be paid. (Tr. pg. 33.) This allegation is not denied by the defendant's answer.

The complaint further alleged that the defendants failed and refused to accept the onions or to

pay the purchase price thereof to the plaintiff's damage in the sum of \$4,572.43. (Tr. pgs. 34-36.) The allegation as to the plaintiff's damage is denied.

The action was tried by the court sitting without a jury. At the conclusion of the plaintiff's case the defendants moved for a nonsuit, which motion was granted by the court. Judgment in favor of the defendants was thereupon entered.

Specification of Errors.

The plaintiff in error relies upon and intends to urge the following error which it asserts was committed by the District Court, viz:

1. The court erred in granting defendant's motion for a non-suit.

Brief of the Argument.

On this writ of error the plaintiff in error maintains that the judgment of the District Court should be reversed for the following reasons, viz:

The court erred in granting defendants' motion for a nonsuit.

The defendants' motion for a nonsuit was made on the following alleged grounds:

1. That the evidence showed the onions were not put on board before March 10th.

2. That the vessel in which the onions were shipped did not leave Australia until March 16th, and that the departure at such time was not an effective shipment such as is called for by the contract.

3. That the vessel did not sail from Melbourne to San Francisco by a direct route, but via Sydney, Wellington and Vancouver. (Tr. pgs. 70-71.)

In granting the motion for a nonsuit the learned judge of the District Court said:

“The Court. I am very much inclined to the view, under the arguments which have been had, Mr. Harwood that you have not shown an effective shipment of these goods in accordance with the contract, that is, having the nature of the goods in view and the stipulations in the contract. I do not know what other meaning to give to the words ‘to be effected’ in connection with the words used there than to be accomplished. You have a stipulation there that the shipment should be effected from Australia. I am always reluctant to grant nonsuits. I always like to see what there is in the merits. When you are dealing with a written contract, however, you have to bring yourself within its terms if those terms inhere in its essential requisites. This certainly does. I think that it would be better—I am inclined to think that unless you had some evidence which would tend to exculpate you in rebuttal from the situation which you are now in, that even if I were to deny the motion now the defendants would have a right, and in order to avail themselves of the question involved they would be called upon to renew the motion upon the completion of the evidence. I am satisfied that standing on the evidence as it is now, I would be called upon to sustain the motion. I might as well

do it now, and if this case is reviewed and the Circuit Court of Appeals should take a different view, then the evidence, being substantially all in the depositions and in the stipulations, would still be before us, there would be no loss in that regard.” (Tr. pgs. 71-72.)

It will be seen that the court granted the nonsuit on the second ground stated in the defendants’ motion, viz., the alleged ground that the departure of the vessel on March 16th was not “an effective shipment as called for by the contract.”

The contract (see page 2, *supra*) contained the following provision:

“shipment to be effected from Australia by steamer on the 10th of March, 1917.”

The contention of the defendants which was sustained by the court was that this clause of the contract required that the steamer depart from Australia not later than March 10th.

It is respectfully submitted that in so holding the learned Judge of the District Court erred, for it has been uniformly held by the courts that a contract calling for a shipment on a certain day is complied with when the goods are delivered to the carrier on that day for shipment.

The evidence in the case at bar shows that the onions were delivered to the steamer before March 10th.

Francis Archibald Drake of Australia, whose deposition was read at the trial, testified that the space

for this shipment of onions was booked on the steamer "Waitotara" on February 26, 1917, and that when the space was booked the steamer was scheduled to sail to San Francisco. (Tr. pg. 42.) Mr. Drake further testified that when the space for the onions was booked the steamer "Waitotara" was scheduled to sail from Melbourne for San Francisco on March 10th. (Tr. pg. 45.)

Mark Francis Shea, whose deposition was read at the trial, testified that his firm superintended the shipment of the onions at Melbourne, and that he commenced to deliver them to the steamer late in February, and that the delivery to the steamer was completed on March 7, 1917. (Tr. pg. 60.)

It will be seen, therefore, it was shown in evidence that the space for the shipment of onions was reserved on February 26th, and that the delivery of the onions to the steamer was completed on March 7th. The contract called for shipment on March 10th.

Goods are shipped when they are delivered to the carrier for transportation. See:

Ledon v. Havemeyer, 121 N. Y. 179; 8 L. R. A. 245, 24 N. E. 297;

Clark v. Lindsey, 47 Pac. 102 (Mont.);

State v. Carson, 126 N. W. 698 (Ia.) 140 Am. St. Rep. 330;

Schwann v. Clark, 27 N. Y. S. 262;

Bouvier's Law Dictionary, word "shipment";

Hutchinson on Carriers, Sec. 113 (Vol. 1);
Bower v. Shand, L. R. 2 App. Cas. 455, 473.

In *Clark v. Lindsey*, 47 Pac. 102 (Mont.), *supra*,
 Judge Hunt, now judge of this court, said:

“When plaintiff’s assignor agreed to ship the goods on or before February 15th, presumably he meant only to deliver the goods on that date to the carrier for transportation on a regular line of transportation between the point of shipment and destination. This was done.”

The word “shipment” is defined by *Bouvier* as follows:

“The delivery of the goods within the time required on some vessel destined to the particular place which the seller has reason to suppose will sail within a reasonable time. *It does not mean a clearance of the vessel*, as well as putting the goods on board where there is nothing to indicate that the seller was expected to exercise any control over the clearance of the vessel or of her subsequent management.”

Ledon v. Havemeyer, 121 N. Y. 179, *supra*, and *Bower v. Shand*, L. R. 2 App. Cas. 455, *supra*, are cited by *Bouvier* in support of the foregoing definition.

Ledon v. Havemeyer, 121 N. Y. 179, *supra*, was (like the case at bar) an action by the vendors to recover the damages which they had sustained by reason of the refusal of the buyers to accept and pay for certain personal property. The commodity in the *Ledon* case was sugar and the contract provided for “shipment within 30 days by steamer

or sail." The sugar was to be shipped from Cuba to New York. The contract was made on February 7th and on March 7th the sugar was delivered on board a vessel at a Cuban port for transportation to New York. The steamer did not sail from Cuba until March 13th. The defendants contended that the vendors had not performed their contract.

The court said:

"The meaning (of the contract), we think, is the putting the goods sold on board a vessel bound for New York with the intent in good faith, to have them cleared for the point of destination in the regular course of trade, *or in a reasonable time after the shipment.*"

The court further said;

"There is nothing in the language used in the contract, or in the surrounding circumstances, to intimate *that the vendors were expected to exercise any control over the clearance of the vessel, or her subsequent management.* That event might be governed by the condition of the tide, the direction of the wind, the facilities for clearance, and many other circumstances over which the vendors had no control, and could not have been supposed to have had when the contract was made. These were matters for the judgment of those navigating the vessel."

The court further said:

"The vendors were bound to ship on some vessel, destined for the port of New York, *which they had reason to suppose would sail within a reasonable time after shipment was made.* * * * *If the vendors, in good faith,*

shipped goods upon such a vessel having reason to suppose she would sail within a reasonable time after shipment, we think it would be all the vendees could require, under the contract; and, if they desired a more speedy performance, it should have been specially provided for by agreement. There is no language in the contract requiring the clearance of the vessel or the arrival of the goods at any particular time."

The court further said:

"The words 'shipment' and 'shipped' are now used indifferently to express the idea of goods delivered to carriers for the purpose of being transported from one place to another."

In *State v. Carson*, 126 N. W. 698 (Ia.), 140 Am. St. Rep. 330, *supra*, the defendant was convicted under a section of the Iowa Code which made it a penal offense to "ship * * * any game birds out of the state." After the defendant had delivered the game birds to an express company they were taken by officers of the law. The defendant contended that he had not shipped the birds. In overruling this contention the court said:

"We are of opinion that the delivery to the carrier for transportation to a point beyond the border of the State constitutes a violation of the statute. The word, 'ship' as therein used must be given its usual and ordinary meaning, if there is nothing in the law itself which indicates a different legislative intent. The words 'ship' and 'shipment' are now generally used to express the idea of goods delivered to carriers for the purpose of being transported

from one place to another, and such signification is given to them by lexicographers generally.”

The facts with reference to the shipment of these onions were all set out in the plaintiff's amended complaint and on the defendants' demurrer thereto the foregoing authorities were cited. The court ruled that the complaint stated a cause of action. But at the trial of the case the learned District Judge held that the words “to be effected” in the sentence “shipment to be effected from Australia by steamer on the 10th of March, 1917,” meant that the steamer must depart from Australia on that date.

It is respectfully submitted that the words “to be effected” cannot be given the meaning attributed to them by the District Court. The word “effected” is synonymous with the word “made” and the contract means the same as if it had read “shipment to be made from Australia by steamer on the 10th of March, 1917.”

The word “shipment” has a well defined legal meaning. The use of the word “effected” in conjunction therewith cannot possibly change the meaning of the word “shipment.” The *shipment* was *effected* when the onions were delivered to the steamer. If the parties had intended that the goods should be shipped on a steamer which should *depart* from Australia on March 10th they would have so specified in their written contract.

The learned judge said that the words “shipment to be effected” meant “to be accomplished.” Un-

doubtedly this is so for "effected" means "accomplished." But it is respectfully submitted the *shipment* was *accomplished* when the goods were delivered to the carrier for transportation or when they were placed on board the steamer.

Reply to contention that evidence shows onions were not put on board before March 10th.

One of the grounds of the motion for nonsuit was "that it affirmatively appeared from the plaintiff's evidence that the goods were not put on board the vessel before the 10th of March."

As stated above, the court, in granting the nonsuit, did not do so on this alleged ground.

But counsel for defendants was in error in contending that the evidence failed to show that the onions were put on board the vessel before March 10th.

Mr. Shea testified as follows:

"Interrogatory No. 3. When did you commence to deliver these onions to the steamer?

Ans. Late in February, 1917.

Interrogatory No. 4. When was the delivery completed?

Ans. On March 7th, 1917." (Tr. pg. 60.)

Mr. Drake testified as follows:

"Interrogatory No. 3. From whom did you receive this bill of lading?

Ans. Messrs. Shea Hood & Co. of Melbourne who received the Bill of Lading from the Union Co. after putting the Onions aboard as our Shippers." (Tr. pg. 42.)

When the witness Shea stated that the onions were delivered to the steamer he necessarily meant *a complete delivery on board the steamer*. The meaning of the expression "delivered to the steamer" is carefully considered by the highest court of New York State in the case of *Baldwin v. Sullivan Timber Co.*, 142 N. Y. 290, 36 N. E. 1060-1061, where the Court of Appeals said:

"There is a further provision that the cargo is 'to be delivered alongside at merchant's risk and expense, and to be received by the master, and secured with the ship's dogs and chains when so delivered, and to be then at ship's risk.' This clause was needless if a mere delivery alongside was a *complete delivery to the vessel, for, after such complete delivery, the liability of the ship would of course attach*. The need of the provision lay in the fact that delivery alongside was not a complete delivery, because the merchant was still to remain in possession and control of his lumber for the purpose of loading and stowing it, and before that was accomplished the ship would assume no risk unless by force of a particular and specific provision, which, therefore, was added, and which put upon the vessel simply the duty of holding the timber safely alongside, *to enable the shipper to complete his delivery by loading and stowing*. And so when the parties agreed in the terms of their contract that, if the cargo should 'not be delivered to vessel at Pensacola' within the specified time, demurrage at a specified rate should be allowed, *the delivery referred to is the complete and final delivery, not merely alongside, but to the vessel, which did not occur until the lumber was loaded and stowed*,

and so passed out of the custody and control of the merchant, and into that of the ship. Wherever a delivery 'alongside' alone is meant, that qualifying word is used, and its omission when 'delivery to the vessel at Pensacola' is prescribed in the clause relating to demurrage indicates that *a complete delivery to the ship*, ending the duty and control of the charterer, was what was meant."

It will be noted that *this very language is used in the contract*, where it is provided that "Quality of the onions *delivered to the steamer* in Australia to be guaranteed and a certificate for same will be provided". (See contract page 2, *supra*.)

Undoubtedly the parties meant by the expression "delivered to the steamer," the loading of the onions on the steamer.

The *Century Dictionary* defines "deliver" as follows:

"To give or hand over; transfer; put into another's possession or power; commit; pass to another; as to deliver a letter."

So when goods are delivered to a person they are placed in his possession and likewise when goods are "delivered" to a steamer they are placed in the possession of the steamer, or on the steamer.

Webster's Dictionary defines "ship" as follows:

"By extension, in commercial usage, to commit to any conveyance for transportation to a distance."

The witness Shea testified that the goods were delivered, that is, committed to the vessel.

“The mere unloading of goods by a vessel does not of itself constitute delivery if the goods are still subject to the risks of transportation.”

The St. Georg, 95 Fed. 172, 177.

“Delivery from a vessel ‘means unloading or discharging from the vessel’.”

The Egypt, 25 Fed. 320.

Conversely “delivery to” means the loading *on* the vessel.

“Delivery by a common carrier implies mutual acts of the carrier and the consignees, and, when a wharf was the place of delivery, a mere physical loading of the goods on the wharf was no delivery.”

Ostrander v. Brown, 8 Am. Dec. 211 (N. M.)

So when the witness testified that the onions were completely delivered to the steamer he meant not only that they were loaded on the vessel but also that they were received by the vessel as a common carrier.

The word “deliver” has been judicially defined as follows:

1. To hand over.
 2. To make delivery of.
 3. To place in the power or possession of another.
 4. To surrender possession of.
 5. To yield possession of.
- 18 *C. J.* 476.

“Delivery has been described as a composite act in which both parties must join.”

18 *C. J.* 478.

One of the meanings of the word “deliver” is *to transfer* (*Century Dictionary*.) The expression “delivered to the steamer” can be rendered “transferred to the steamer.”

“Delivery” is defined by the *Standard Dictionary* as

“a transference or passing over from one to another, as a delivery of stocks.”

Furthermore the word *to* means *on* or *upon*. *To* is defined by the *Century Dictionary* as follows:

“Upon; on; denoting contact, junction, or union.”

There are three separate answers to the defendants’ contention that the evidence does not show that the onions were loaded on the steamer by March 10th. These answers are:

1. That the testimony does affirmatively show that the onions were delivered on board the steamer.

2. That delivery on board was not essential, the shipment being effected when the goods were delivered to the carrier for loading.

3. Even if the meaning of the language used by the witness was doubtful, that is, even if his testimony left it uncertain as to whether the onions were actually on board on March 7th, on this motion for a nonsuit the doubt should be resolved in favor of the plaintiff, as on such motions every reasonable inference in favor of the plaintiff should be indulged in.

We have already seen that the testimony affirmatively shows that the onions were delivered on board the steamer on March 7th.

But delivery on board was not essential for a shipment is accomplished when the goods are delivered to the carrier for transportation. This is shown by the authorities cited in the first part of this brief.

In *Clark v. Lindsay*, 47 Pac. 102 (Mont.) Judge Hunt said:

“When plaintiff’s assignor agreed to ship the goods on or before February 15th, presumably he meant only to deliver the goods on that date to the carrier for transportation on a regular line of transportation between the point of shipment and destination. This was done.”

And in *Ledon v. Havemeyer*, 121, N. Y. 179, *supra*, the court said:

“The words ‘shipment’ and ‘shipped’ are now used indifferently *to express the idea of goods delivered to carriers for the purpose of being transported from one place to another.*”

The learned District Judge held during the trial that it was not necessary to show that the goods were put on board the steamer. In reply to the statement of counsel for plaintiff that “according to the authorities, when goods are delivered to the steamer they are delivered on board,” Judge Van Fleet said:

“I should think that would be true. A party is not permitted to put them on board.” (Tr. pg. 62.)

In *Hutchinson on Carriers*, Sec. 113 (Vol. 1), the author says:

“If delivery be made at the warehouse or other place of business of carrier for as early transportation as can be made in the course of the carrier’s business, and subject only to such delays as may necessarily occur in awaiting the departure of trains, vessels * * * he becomes at once a carrier of the goods. * * * *It makes no difference whether the loading is to be performed by the shipper himself or the carrier.*”

The bill of lading introduced in evidence is dated March 12, 1917. At the trial it was contended by counsel for defendants that the date of the bill of lading was *prima facie* the date of shipment. Unquestionably that is the case, but in this case the evidence aside from the bill of lading shows that the shipment was completed on March 7th.

But even if the shipment had not been made until March 12th this slight and unimportant delay would not void the contract.

In *Norrington v. Wright*, 115 U. S. 188, 203, cited in *Mechem on Sales* (Sec. 1215) the facts were that contract called for shipment of “about 1,000 tons per month during each month, beginning February 1880.” Only 400 tons were shipped in February, and 885 in March. The court held that this was not a compliance with contract and that the buyer was entitled to rescind. But with reference to under-shipments in June the Supreme Court said:

“*Slight and unimportant deficiencies may be made up in July.*”

So here, a "slight and unimportant" variation of a day or two was not vital. The Supreme Court in the above case held that a "statement descriptive of the subject matter, or some material incident such as the time or place of shipment is *ordinarily* to be regarded as a warranty." There was a warranty that 1000 tons would be shipped in June but nevertheless it was held that slight and unimportant deficiencies might be made up in July.

Ordinarily the time of the voyage from Melbourne to San Francisco is about a month, so it is apparent that a variation of two days was unimportant. In fact a variation of two days in the sailing time between these ports is very frequent. The situation is very different from the situation presented in the case of *Redlands Orange Growers v. Gorman*, 76 Mo. App. 184, cited by defendants at the trial, where the contract called for the shipment of oranges from California to St. Louis. The contract called for shipment on December 21st and it was known that the oranges were required for the St. Louis holiday trade. In this case a delay of 2, 3 and 4 days was held material. The time consumed in transportation was only four days, the oranges moving by special fast freight.

In *Morel v. Stearns*, 75 N. Y. S. 108, 1082, the court said:

"Delivery about noon on June 1st is sufficient compliance with contract to deliver goods in April and May."

In the case at bar it is apparent that a delay of two days in the shipment could in no way have injured the defendants.

In *Ingram v. Wackernagel*, 48 N. W. 998, a day's delay was held not material.

Even if the language of the witnesses had left it in doubt as to whether the onions were loaded on the vessel before March 10th that doubt, on a motion for a nonsuit should have been resolved in favor of the plaintiff.

Even if the testimony of the plaintiff's witnesses had left it in doubt as to whether the onions were delivered on board the steamer before March 10th, that doubt should have been resolved in favor of the plaintiff on a motion for a nonsuit.

In 38 *Cyc.* 1551 the author says:

"It (a motion for a nonsuit) admits the truth of plaintiff's evidence and every inference of fact that can legitimately be drawn, and on such motion the evidence will be interpreted most strongly against defendant."

It is not necessary that the fact in issue is necessarily inferable from the testimony; it is sufficient if the fact in issue *may be* inferred therefrom. In *Ferris v. Baker*, 127 Cal. 523, the court said:

"Perhaps none of these are necessary inferences from the facts proven, but, as the evidence tended to justify them, they are to be regarded for present purposes as facts established; as such they tend to show the relation of mining

partners between plaintiff and Mrs. Baker. It was error, therefore, to order a nonsuit."

In 38 *Cyc.* 1553 the author says:

"On motion for nonsuit, plaintiff is entitled to the most favorable construction of the evidence that can be given it. All the facts given in evidence to support the material allegations of the declaration or complaint are taken to be true, and plaintiff is entitled to the most favorable inferences deducible from the evidence."

In 38 *Cyc.* 1559 the author says that a motion for a nonsuit must be denied:

"Where upon any construction which the jury is authorized to put upon the evidence, or by any inference they are authorized to draw from it, plaintiff is entitled to recover."

In *Estate of Arnold*, 147 Cal. 586, the court said:

"Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as facts proved in favor of the contestants. Where evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the contestants. All the evidence in favor of the contestants must be taken as true, and if contradictory evidence has been given it must be disregarded."

In *Warner v. Darrow*, 91 Cal. 309, 312, the court said:

"A motion for a nonsuit admits the truth of plaintiff's evidence and every inference of fact which can be properly drawn therefrom."

Even where evidence is improperly admitted over objection if it tends to prove the material fact in issue a motion for a nonsuit must be denied. In *Wright v. Roseberry*, 81 Cal. 91, the court said:

“Even where evidence is erroneously admitted against objection, but tends to prove something, full effect must be given to it upon motion for nonsuit.”

On a motion for a nonsuit the evidence should be interpreted most strongly against the defendant. In *Goldstone v. Merchants' Etc. Co.*, 123 Cal. 631, the court said:

“The motion for nonsuit admits the truth of plaintiff's evidence and every inference of fact that can be legitimately drawn therefrom (*Wright v. Roseberry*, 81 Cal. 87; *Warner v. Darrow*, 91 Cal. 309); and I think upon such motion the evidence should be interpreted most strongly against the defendant. I think also that the rules as to nonsuit are the same whether the trial is by the court or by a jury.”

To the same effect is *Hanley v. California Etc. Co.*, 127 Cal. 236.

Reply to contention that nonsuit should be granted because of the indirect course which the vessel followed.

The third alleged ground of the motion for nonsuit was that the onions arrived at San Francisco 69 days after March 10th, and that the steamer touched at Sydney, Wellington and Vancouver before arriving at San Francisco.

But the evidence shows that when the space for the onions was reserved with the steamship company

on February 26th and when the shipment was made the "Waitotara" was scheduled to sail direct to San Francisco.

Mr. Drake testified as follows:

"Interrogatory No. 4. Q. Do you know when the space for this shipment of onions was booked or reserved with Union Steamship Company of New Zealand?

Ans. Yes.

Q. If the answer to the preceding interrogatory was "yes," please state when said space was booked.

Ans. February 26th, 1917.

Q. At the time this space was booked, for what voyage was the 'Waitotara' advertised or scheduled?

Ans. Our advice was that the 'Waitotara' was engaged to start for San Francisco." (Tr. pg. 42.)

"Interrogatory No. 10. Before the completion of the delivery of the onions to the steamer, had you been informed by Union Steamship Company of New Zealand, Ltd., or by anyone else, that the 'Waitotara' would not sail direct to San Francisco?

Ans. No.

Interrogatory No. 11. Before the completion of the delivery of the onions to the steamer had any one connected with the firm of George Wills & Company, Limited, to your knowledge, been informed that the 'Waitotara' would not sail direct to San Francisco?

Ans. No.

Interrogatory No. 12. When did you first learn that the 'Waitotara' would proceed to San Francisco via Vancouver?

Ans. Too late to divert owing to onions being already loaded. In fact the ship had sailed

before I knew of the diversion.” (Tr. pgs. 43-44.)

Interrogatory No. 14. At or before the time of the delivery of the onions to the steamer, did you know that the “Waitotara” would proceed to San Francisco via Vancouver?

Ans. No.

Interrogatory No. 15. To your knowledge, at or before the time of the delivery of the onions to the steamer, did anyone connected with George Wills & Sons, Limited, know that the ‘Waitotara’ would proceed to San Francisco via Vancouver?

Ans. Not to my knowledge.

Interrogatory No. 16. When did you first learn that the ‘Waitotara’ would touch at Wellington and Sydney on its way to San Francisco?

Ans. Not until after the ship had sailed.” (Tr. pgs. 44-45.)

On cross-examination Mr. Drake testified:

“Cross-Interrogatory No. 5. What ports, if any, were you informed that the ‘Waitotara’ would visit upon this voyage from Melbourne to San Francisco?

Ans. I was given to understand that it was a direct sailing to San Francisco.

Cross-Interrogatory No. 6. Did you make any inquiry of any of the officials of the Union Steamship Company, Ltd., before you commenced to deliver the onions covered by the bill of lading mentioned in Interrogatory No. 2 as to the time of departure or route to be followed by the ‘Waitotara’?

Ans. Yes, I did make enquiry and was informed that the ‘Waitotara’ would sail on the 10th March from Melbourne to San Francisco as a direct steamer.” (Tr. pgs. 47-48.)

The contract required the plaintiff to ship the onions on March 10th and the evidence shows that the plaintiff performed the contract. The delay of six days in the clearance of the vessel and the indirect course followed were matters beyond the control of the plaintiff. The contract did not call for delivery at San Francisco within any specified time. The evidence shows that when the space for the goods was reserved and when the goods were shipped the steamer was scheduled to sail direct from Melbourne to San Francisco.

Where the shipment is made at the time stipulated in the contract the vendee is bound to accept and pay for the goods although the arrival of the goods was delayed. See:

Peace River Phosphate Co. v. Grafflin, 58 Fed. 550;

43 *Century Dig.*, Title "Sales", Sec. 428;

Hardesty v. Pittsburgh Co., 89 S. W. 260;

Hawes v. Lawrence, 4 N. Y. 345.

In defining the word "shipment" *Bouvier* says:

"The delivery of the goods within the time required on some vessel destined to the particular place which the seller has reason to suppose will sail within a reasonable time. It does not mean a clearance of the vessel, as well as putting the goods on board where there is nothing to indicate that the seller was expected to exercise any control over the clearance of the vessel or of her subsequent management."

In their motion for a nonsuit counsel for defendant contended that the plaintiff's duty

“was to choose a reasonable method of delivery, and that such method of delivery affirmatively appears from the plaintiff’s evidence not to have been a reasonable method of carrying out their contract”.

There can be no question as to the “reasonableness of the method of delivery” as the contract contains an express provision as to when the shipment should be made, and it was never intended (if this provision was complied with), that any subsequent delay on part of the carrier should avoid the contract.

The defendants received the very performance they contracted to receive, viz.: a shipment on March 10th from Melbourne to San Francisco. If the parties had intended that the goods should arrive at San Francisco within a specified time they would have so stipulated in their contract, and if it had been the intention of the parties that the goods should arrive at a certain time, or that the vessel on which they were shipped should not divert from a direct route, they would likewise have so stipulated.

It is respectfully submitted that the judgment of the District Court should be reversed.

Dated, San Francisco,
February 10, 1923.

ALFRED J. HARWOOD,
Attorney for Plaintiff in Error.

San Francisco Law Library.

No. 3898

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE WILLS & SONS, LIMITED

(a corporation),

Plaintiff in Error,

vs.

WILLIAM R. LARZELERE and JOSEPH J.

SWEENEY, copartners doing business under
the firm name of LARZELERE, SWEENEY COM-
PANY,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

CHARLES W. SLACK AND

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Attorneys for Defendants in Error.

San Francisco Law Library.

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(a corporation),

Plaintiff in Error,

VS.

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SWEENEY, copartners doing business under
the firm name of LARZELERE, SWEENEY COM-
PANY,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

Statement of the Case.

This is an appeal from a judgment of nonsuit in an action for the alleged breach by defendants in error of a contract for the purchase of onions, the contract being in the words and figures following (Tr. pp. 3, 4):

“San Francisco, California, U. S. A.,
Feb. 19, 1917.

Larzelere, Sweeney Co.,
San Francisco.

Dear Sirs:

We hereby confirm the sale to you, through Mr. M. J. O'Reilly, of 75 (seventy-five) tons of

2240 lbs. Crated Brown Australian Onions at the price of 4 (four) cents U. S. currency per pound, landed on the dock, duty paid, San Francisco.

Shipment to be effected from Australia by steamer on the 10th of March, 1917.

Quality of Onions delivered to the steamer in Australia to be guaranteed and a Certificate for same will be provided.

The Onions to be paid for by you in Cash on arrival in San Francisco.

This contract is of course subject to the usual clause exempting us from claims of any nature, through non-fulfillment caused by conditions, over which we have no control.

Yours faithfully,

For George Wills & Sons, Ltd.
A. N. Anderson,
Manager.

Accepted:

Larzelere, Sweeney Co." (Italics ours.)

The onions were delivered to the steamship "Wai-totara", at Melbourne, Australia, such delivery being completed on March 7, 1917 (Tr. p. 64). A bill of lading therefor was issued on March 12th (pp. 51-8). The vessel left Melbourne March 16th (p. 45), touched at Sydney, Australia, and Wellington, New Zealand (p. 45), and proceeded to San Francisco by way of Vancouver, British Columbia (p. 12), arriving on May 19th (p. 4). On the arrival of the onions, defendants declined to accept them, and plaintiff sold them at a loss, bringing this action for the difference between the contract price and the sum for which the onions were sold.

At the conclusion of plaintiff's evidence, defendants moved for a nonsuit on three grounds, set forth

at length in the transcript (pp. 70-1). These grounds, briefly stated, are as follows:

1. That the plaintiff failed to ship the onions on board the vessel by March 10, 1917, as called for by the contract.

2. That, as the vessel did not leave Australia until after March 16, 1917, there was no *effective shipment* of the onions, as called for by the contract.

3. That, as the contract called for the delivery of the onions at San Francisco, it affirmatively appeared from plaintiff's evidence that the shipment of the onions by way of Melbourne, Sydney, Wellington and Vancouver, was not a reasonable method of delivery.

While the court, in ruling on the motion, referred particularly to the second ground of nonsuit (pp. 71-2), the order granting the nonsuit was general (p. 73), so that, if any one of the grounds of the motion was valid, the judgment of the lower court must be affirmed. We shall endeavor to show to the court, however, that the motion was good on each of the grounds mentioned.

Argument.

Defendants take the position that they were not bound to accept the onions, on account of breaches of the contract by plaintiff in two respects: first, as to the time of shipment; and, second, as to the manner of delivery. The first two grounds of nonsuit

were directed to the time of shipment, and the third ground of nonsuit was directed to the manner of delivery.

As to the time of shipment, the contract provides for "shipment to be effected by Australia by steamer on the 10th of March, 1917". We contend, first, that the onions were not shown to have been *loaded on board the vessel* by March 10th, and second, that, as the vessel did not leave Melbourne until March 16th, and thereafter touched at Sydney, Australia, more than a day's journey from Melbourne, shipment was not "effected from Australia" until March 18th, at the earliest.

1. THE EVIDENCE DOES NOT SHOW A "SHIPMENT" OR LOADING ON BOARD BY MARCH 10TH.

The bill of lading is dated March 12, 1917 (p. 58), two days later than the time called for by the contract. The bill of lading is presumptive evidence of the date of shipment:

Bowes v. Shand, L. R. 2 App. Cas. 455, 482;
J. Aron & Co. v. Comptoir Wegimont, 3 K. B.
 (1921) 435, 438.

In *Bowes v. Shand*, *supra*, Lord Blackburn said (p. 482):

"I think the material thing is the completion of the putting it on board, which would entitle you to the bill of lading; but *the bill of lading would be strong, and in most cases conclusive evidence, of the date when the shipment was completed.*" (Italics ours.)

In *J. Aron & Co. v. Comptoir. Wegimont, supra*, the court expressed a doubt as to the bill of lading being *conclusive* evidence, but held it was *prima facie* evidence of the date of shipment.

Therefore, unless there was other evidence to show an earlier shipment, plaintiff has not brought itself within the requirements of the contract as to "shipment" on March 10th. Plaintiff's answer to this contention may be divided into four heads, each of which we shall demonstrate to be absolutely unsound. Counsel for plaintiff contend:

(1) That the testimony of Mark Shea, showing a delivery to the steamer on March 7th, shows a sufficient shipment under the contract, irrespective of when the goods were put on board the steamer;

(2) That the words "deliver to" necessarily mean "deliver on board" the steamer;

(3) That, if the words "deliver to" do not necessarily mean "deliver on board", on a motion for nonsuit they must be given that meaning; and

(4) That, even if there was no showing of a loading on board within the time provided in the contract, a delay of two days in shipment was immaterial.

In support of its contention that delivery to the steamer is shipment, irrespective of the time of loading, counsel says (Plaintiff's Brief, p. 8) that "goods are shipped when they are delivered to the

carrier for transportation”, and cites the following authorities:

Ledon v. Havemeyer, 121 N. Y. 179, 24 N. E.

297, 8 L. R. A. 245;

Clark v. Lindsay, 19 Mont. 1, 47 Pac. 102;

State v. Carson, 147 Iowa 561, 126 N. W. 698,

140 Am. St. Rep. 330;

Schwann v. Clark, 7 Misc. 242, 27 N. Y. S.

262;

Bouvier's Law Dictionary, “Shipment”;

1 *Hutchinson on Carrier*, Sec. 113;

Bowes v. Shand, L. R. 2 App. Cas. 455.

Instead of supporting counsel's statements, these authorities cited show conclusively that a shipment on a vessel implies not only a delivery to the vessel, but an *actual loading on board*.

3 *Bouvier's Law Dictionary*, (1914 ed.), p. 3066, defines “shipment” as follows:

“Shipment. The delivery of the goods within the time required *on* some vessel destined to the particular port which the seller has reason to suppose will sail within a reasonable time. It does not mean a clearance of the vessel as well as *putting the goods on board* where there is nothing to indicate that the seller was expected to exercise any control over the clearance of the vessel or of her subsequent management.” (Italics ours.)

In *Ledon v. Havemeyer*, *supra*, the contract called for “shipment within thirty days”, which the court held (121 N. Y. 184) to mean,

“*putting the goods sold on board* a vessel, bound for New York, with the intent, in good faith,

to have them cleared for the port of destination in the regular course of trade, or in a reasonable time after shipment". (Italics ours.)

The court quotes with approval from Webster and Worcester, as follows (121 N. Y. 187):

"Thus, Webster defines 'shipment' to mean: 'The act of *putting anything on board* of a ship or other vessel.' Worcester: 'The act of shipping or *putting on board a ship.*'" (Italics ours.)

In referring to the case of *Bowes v. Shand*, *supra*, the court again said (121 N. Y. 187):

"The case was ably and exhaustively discussed by the Lord Chancellor and the Law Lords generally, and the court were unanimously of the opinion that the word 'shipped', according to its natural and ordinary signification, as well as its meaning in the mercantile community, was *the putting of the goods on board the vessel and taking a bill of lading therefor.* (Italics ours.)

Lord Hatherley, in his opinion in the case of *Bowes v. Shand*, *supra*, said (p. 473):

"I think the meaning of the word 'shipped' is sufficiently understood by this time in commerce. But if it were needed I think we have sufficient evidence before us that by the word 'shipped' all the witnesses understand *put on board.*" (Italics ours.)

And the Lord Chancellor in the same case said (p. 464):

"I should say it meant that the shipment must be made, that the rice must be *put on*

board, during two specified months.” (Italics ours.)

In the case of *Schwann v. Clark, supra*, where the contract called for October shipment, there was no discussion of the meaning of the terms “shipment”, but the goods, according to the opinion, were in fact *placed on board* in October.

It is very doubtful if the cases of *Clark v. Lindsay, supra*, and *State v. Carson, supra*, which relate to land shipments by rail, can have any weight in determining the meaning of the word “shipment” in connection with transportation by water, for the word “shipment”, when applied to land transportation, is necessarily used in a secondary or extended sense. Transportation by rail involves delivery to a carrier, running its trains daily or oftener on a regular schedule, and the time between the delivery to the carrier and the loading on the cars is insignificant in such cases. In water transportation, however, ships must be secured for the transportation of the goods, and the buyer protects himself against the uncertainties of the business by providing a definite time of shipment. It may be noted, however, that in the case of *Clark v. Lindsay, supra*, the cattle in question were in fact put on board the cars on the date provided for the shipment, and in *State v. Carson, supra*, the game, which the defendant was accused of having shipped, was removed from the cars. In each case, therefore, there was an actual loading as part of the shipment.

Counsel's citation of 1 *Hutchinson on Carriers*, Sec. 113, is not in point, as the section cited deals only with the question of when the vessel's liability as a common carrier attaches, and does not touch on any question of shipment.

The foregoing authorities, though cited by counsel, demonstrate the correctness of defendants' contention that the *loading of the goods* is an essential element of shipment. We might rest upon these citations, but we refer the court to the following recent cases to the same effect:

Comptoir Commercial Anversois v. Power, Son & Co., 1 K. B. (1920) 868, 885;

J. Aron & Co. v. Comptoir Wegimont, 3 K. B. (1921) 435;

Diamond Alkali Export Corp. v. Fl. Bourgeois, 3 K. B. (1921) 443, 446.

In each of the cases last cited, it is held that shipment means shipment on board.

Perhaps recognizing the weakness of his first contention, counsel quotes (Plaintiff's Brief, p. 13) the testimony of the witness Shea with reference to the delivery of the onions, and on the following pages makes the remarkable pronouncement that

"when the witness Shea stated that the onions were delivered to the steamer, he necessarily meant a complete delivery on board the steamer."

In support of this statement, counsel cites the case of *Baldwin v. Sullivan Timber Co.*, 142 N. Y.

279, 36 N. E. 1060. An examination of that case shows that it in no way bears out counsel's contention. The question there involved was one of demurrage upon a charter of a steamer belonging to plaintiff. The charter party provided that the lay days were to commence when the vessel was ready to receive cargo and had given written notice thereof to the charterer, and further that "should the cargo not be delivered at Pensacola within specified time", certain demurrage would be payable by the charterer, the defendant in the action. Under the charter party the defendant was not only to furnish the cargo, but was also to load and stow it. The delay complained of was not occasioned by any default in delivering the cargo alongside, but was caused by defendant's neglect to load and stow the cargo with diligence. The court very properly held that there was no complete delivery until the cargo was loaded and stowed,

"because the merchant was still to remain in possession and control of his lumber for the purpose of loading and stowing it." (142 N. Y. 284.)

The case is in no way inconsistent with the definitions of the word "delivery" contained in the other cases and dictionaries cited and quoted by counsel, with which we have no quarrel. They all hold that "delivery" is effected when possession is transferred from one party to the other, which is the accepted sense of the word.

In the case at bar, plaintiff had no duty to load or stow the cargo itself. It was merely to deliver the goods to the steamer and see that they were "shipped"—loaded on board—by March 10th. Of course, one cannot literally "deliver" goods to a steamer, an inanimate object, because such an inanimate object cannot take possession of the goods. One really delivers to the agents or persons in charge of the steamer, and a delivery is made when the goods are placed in the possession of such agent at the dock where the vessel is lying, or when goods in lighters are brought alongside a vessel and taken in charge by the vessel's officers and crew. When they are so taken in charge, the transfer of possession has been effected and the delivery is complete. If the goods are to be loaded by the vessel, as in the case at bar, the delivery is necessarily complete before the loading is done.

In the case of *J. Aron & Co. v. Comptoir Wegimont*, 3 K. B. [1921] 435, goods were delivered to the dock to the ship's agent, but owing to a longshoremen's strike, they were not put on board within the required time. The court there said (p. 438):

"Delivery at docks to the agents of a ship for the purpose of future shipment is not the same as an actual shipment on board."

In that case, as in the case at bar, there was a delivery, but there, as here, there could be no shipment until the goods were on board. Therefore,

when Shea testified that the delivery was completed on March 7th, all that his testimony can be construed to mean is that on that day, plaintiff parted with possession of the onions, and the agents of the steamer took possession of them either on the dock, at ship's tackle or alongside the steamer, for the purpose of afterwards putting them on board. The only evidence of the date of the putting on board is the bill of lading, which is dated March 12th.

There was thus a complete failure on the part of plaintiff to show a shipment before March 12th. Counsel endeavored to supply this gap in plaintiff's evidence by invoking the well known rule that, on a motion for nonsuit, every intendment must be indulged in favor of the truth of the plaintiff's evidence. The cases cited by counsel fully support the rule, but they do not bear out counsel's statement (Plaintiff's Brief, p. 21) that

“even if the language of the witnesses had *left it in doubt* as to whether the onions were loaded on the vessel before March 10th, *that doubt*, on a motion for nonsuit should have been resolved in favor of the plaintiff.”

The question is not one of *doubt*, but one of a presumptive shipment on March 12th, as shown by the bill of lading, and an utter *absence of proof* of an earlier shipment.

It is a matter of common knowledge that the weight, character and destination of particular

parts of any cargo are factors to be taken into consideration in determining when and where on the ship the cargo shall be stowed, and the time or manner of storage in no wise depends on the date of delivery to the ship. It is quite likely that, owing to the well known fact that onions sometimes contaminate other goods placed in their vicinity, the onions were not stowed until the character of the other cargo was determined. This, of course, is conjecture, which we may indulge in in argument, but on the trial plaintiff was called on for proof. The *fact* as to the date of shipment, which may have been on any date from March 7th to March 12th, has not been proved, but what *evidence* there is—the bill of lading—shows a loading on March 12th. For the lower court to have found that the goods were shipped on any other date, it would have had to indulge in conjecture where proof was required. As was said in the case of *Janin v. London and San Francisco Bank*, 92 Cal. 14, 27 (quoted with approval in 38 *Cyc.*, p. 1555, on the question of nonsuit),

“In order to justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists, and when the evidence is not sufficient to justify such an inference, the court may properly refuse to submit the question to the jury.”

Similarly, in the case of *Samulski v. Menasha Paper Company*, 147 Wis. 285, 292, 133 N. W. 142, 145, it was said:

“The person on whom the burden of proof rests to establish the right of a controversy, must produce credible evidence from which men of unbiased minds can reasonably decide in his favor. He cannot leave the right of the matter to rest in mere conjecture and expect to succeed.” (Citing cases.)

Seeking to avoid the effect of the absence of proof of a shipment by March 10th, counsel for plaintiff says that

“even if the shipment had not been made until March 12th, this slight and unimportant delay would not void the contract.” (Plaintiff’s Brief, p. 19.)

It is an almost elementary principal of the law of sales that *when the time for performance of a contract of sale is fixed, it is of the essence of the contract and, unless waived by the other party, performance at the time stipulated is indispensable.*

2 *Mechem on Sales*, Sec. 1138;

35 *Cyc.*, 178;

Norrington v. Wright, 115 U. S. 188;

Cleveland Rolling Mills v. Rhodes, 121 U. S. 255;

Bowes v. Shand, L. R. 2 App. Cas. 455.

We do not feel that the court would desire, or expect, us to elaborate the citation of cases on this point, so we shall content ourselves with quoting a

single paragraph from the case of *Norrington v. Wright*, *supra*, where Mr. Justice Gray said (p. 203):

“In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract.” (Citing, among other cases, *Bowes v. Shand*, *supra*.)

The attempt of counsel to distort the case of *Norrington v. Wright* into a support for his statement (Plaintiff's Brief, p. 20), that “a slight and unimportant variation of a day or two was not vital”, is almost ludicrous. Aside from the fact that the permissible variation referred to in the case of *Norrington v. Wright* was one in quantity and not in time, the variation was only held to be permissible because of the fact that the contract called for shipments of *about* 1000 tons per month, the very purpose of the use of the words “about” or “more or less” being to allow a margin of variation, thereby avoiding the otherwise strict application of the rule just quoted.

The cases of *Morel v. Stearns*, 37 Misc. 486, 75 N. Y. S. 1082, and *Ingram v. Wackernagel*, 83 Iowa

82, 48 N. W. 998, cited by counsel, in no way depart from the rule announced in *Norrington v. Wright*, In *Morel v. Stearns*, the contract called for May delivery and the goods in question were due to arrive at New York, the port of delivery, on May 29th or May 30th. Both the buyer and the seller's agents had offices in New York, and on May 29th, the seller wrote the buyer a letter, advising him of the expected arrival of the goods and asking him where he desired delivery to be made. Owing to the fact that May 30th was a holiday and the buyer's office was closed, the letter was not answered until May 31st, when the buyer replied by letter, demanding delivery that day. Plaintiff's agents received the letter about noon of the 31st, gave instructions to a forwarding agent for delivery at the place designated, and the goods were delivered the following day, June 1st. It appeared from the evidence that on previous shipments it had been the custom of the seller's agents to advise the buyer of the arrival of the goods, and to deliver them according to instructions then given, the contract being silent as to the place of delivery in New York. The court held that, in view of the fact that the goods were delivered within one day after the receipt of the buyer's instructions, the failure to deliver was due to the fact that the buyer's office was closed on May 30th, and not to any fault of the seller. The sentence in quotation marks, appearing at the bottom of page 20 of Plaintiff's Brief, is not contained in the report of the case, but the following sentence does appear (75 N. Y. S. 1083-4):

“It is conceded by both parties to the controversy that *a contract of the nature described would require strict performance as to time of delivery* on the part of the vendors.”

In the case of *Ingram v. Wackernagel*, *supra*, the last day provided for delivery fell on a Sunday, and it was held that a delivery on the following Monday was a compliance with the terms of the contract. The fact that the industry of counsel has brought to light no cases supporting his contention that the variation of two days in shipment is immaterial—“slight and unimportant”, as he says—demonstrates the universality of the rule of *Norrington v. Wright*, and shows that the judgment of the lower court should be sustained on the first ground of nonsuit urged by defendant.

This brings us to the *second* ground of nonsuit, namely:

2. THERE WAS NO EFFECTIVE SHIPMENT AS REQUIRED BY THE CONTRACT.

Defendants concede that if the contract had called for “shipment March 10th” merely, and the onions had been put on board on that day, the fact that the vessel did not depart from Australia for several days thereafter would not afford a valid reason for refusing to accept them on arrival. As was stated in the definitions of shipment quoted above, a provision for shipment by a certain date requires a departure within a reasonable time thereafter and not a clearance on the date specified. But the contract

in the case at bar calls for something more than "shipment of March 10th." It calls for "*shipment to be effected from Australia* by steamer on the 10th of March, 1917". This language, which is plaintiff's own language, and is therefore to be construed strictly against plaintiff, calls for something more than "shipment". It requires a shipment "*to be effected from Australia*" by the date specified. Unless we are to say that the words "to be effected from Australia" are to be stricken from the contract, they must be given their natural significance, which is that the parties contemplated a shipment and *a departure from Australia* by March 10th, and such was the ruling of Judge Van Fleet, who said (tr. pp. 71, 72):

"I am very much inclined to the view, under the arguments which have been had, Mr. Harwood, that you have not shown *an effective shipment* of these goods in accordance with the contract, that is, having the nature of the goods in view and the stipulations in the contract. I do not know what other meaning to give to the words 'to be effected' in connection with the words used there than to be accomplished."

The goods in question, onions, are of a perishable nature, and a delay of even a day in their transportation on a voyage ordinarily requiring a month for its completion might result in serious loss. The word "effect" is defined by the Standard Dictionary

"to be the cause or producer of; bring about; *especially, to bring to an issue of full success; accomplish; achieve; as to effect a reform.*" (Italics ours.)

The word "from" implies a departure or separation (*United States v. La Coste*, 2 Mason 129, 26 Fed. Cas. 826), and the words "effected from" are certainly apt to express the idea which must have been in the minds of the contracting parties, namely, that the onions would *leave Australia* on March 10th, and could reasonably be expected to arrive in about a month's time after that date.

The case at bar is exactly analogous to the case of *Tobias v. Lissberger*, 105 N. Y. 404, 12 N. E. 13, 59 Am. Rep. 509, which involved a contract for iron rails "*for prompt shipment by sail from Europe and for delivery on dock at the port of New York.*" In that case, on the day after the contract was signed the rails were loaded on board a steamer at Stettin, Germany, a city forty miles from the sea, on a river which was ice-bound at the time of loading. The ice did not break up for two months, and the vessel departed for New York on the 2d or 3d of April. On the arrival of the goods, the buyer rejected them. The court held that the contract had not been performed by the buyer because the goods had not been promptly shipped, saying (105 N. Y. 411-2):

"The sole object of prompt shipment was to secure a speedy arrival for delivery in New York. Until then the goods were at plaintiffs' risk, and only then could the defendant's liability attach. Before that event happened there was to be neither transfer of title nor transfer of possession. It is quite unimportant to inquire how it might be as between the master of the vessel and the plaintiffs, or the shipper, one of whom may be assumed to be the owner, and the other, by virtue at least of the bill of lading,

entitled to possession. *In the case before us it is more reasonable to construe the condition of prompt shipment as a precedent to delivery, and so relating to the actual commencement of the voyage that the known unnavigable condition of the river could furnish no excuse for the delay. The defendant was entitled to such timely delivery as would follow an effective shipment; in other words, to an exact performance by the plaintiffs of their contract to ship and deliver, not two things separable in their nature, but two steps to a single end. That involves not only a purpose to transport, but an expectation that transportation would commence, if not at once, certainly within a reasonable time. Shipment cannot be said to have been made from Europe, when the port selected had no passage-way or outlet. Nor can it be fairly argued even that the iron was shipped 'for delivery in New York', if it was apparent to the shipper that the vessel could not leave the docks where it took in freight. Something more than shipment was bargained for, viz., prompt shipment, and the delivery was to be within such time as, dangers of the sea only excepted, might reasonably follow. Nothing less could have been in the minds of the parties than expedition, or immediate and effective, or beneficial shipment as a step towards delivery."* (Italics ours.)

So, in the case at bar, the parties used words exactly suited to their intention, requiring a departure not only from Melbourne, but *from Australia* on March 10th, "as an immediate and *effective*, or beneficial shipment, as a step towards delivery." The evidence shows, however, that the steamer, after leaving Melbourne on March 16th, went to Sydney, Australia, over five hundred miles from Melbourne,

a journey which must have postponed the *departure from Australia* at least another two days. It seems to us that, even if the steamer had cleared from Melbourne on March 10th, the touching at Sydney postponed the departure from Australia beyond the stipulated time; for, if the steamer could touch at Sydney, why not call at Newcastle and Brisbane as well? Both ports are on the east coast of Australia, to the north of Melbourne, and more or less on the way to San Francisco, yet a week's time could be consumed in making successive stops at the ports mentioned. The answer to the question is that the length of time for a voyage from any one of these ports to San Francisco is about the same, and if the goods were shipped at and departed from any one of the four ports mentioned on March 10th, thus departing *from Australia*, defendants could calculate, with some reasonable degree of certainty, the time of their arrival at San Francisco. Therefore the contract was drafted to provide for a shipment "*to be effected from Australia* on the 10th day of March."

In addition to its failure to comply with the terms of its contract as to the *time of shipment*, plaintiff failed to live up to its contract in the particulars specified in our *third* ground of nonsuit, namely:

3. PLAINTIFF DID NOT DELIVER, OR ATTEMPT TO DELIVER, THE GOODS IN A REASONABLE MANNER.

The place of delivery of the onions, as provided in the contract, was "landed on the dock, duty paid,

San Francisco''. Plaintiff therefore assumed the burden of delivery, and it was incumbent on plaintiff, not only to ship the goods in time, but to choose a method of delivery which would bring them to the buyer within a reasonable time thereafter, the nature of the goods, the course of trade and the distance between the port of shipment and the port of delivery being considered. Under these circumstances, plaintiff shipped the onions on a vessel which sailed from Melbourne to Sydney, thence to Wellington, New Zealand, thence to Vancouver, British Columbia, and finally arrived at San Francisco on May 19th, *seventy days* after the date of shipment provided in the contract, and *sixty-four days* after the date of departure from Melbourne! The time ordinarily consumed in making the trip from Australia to San Francisco by steam is *thirty days*. (Plaintiff's Brief, p. 20.)

It appears in the evidence that at the time the contract was made, Oceanic Steamship Company ran a regular line of steamers, plying on a regular schedule between Australia and San Francisco (p. 50), and that plaintiff endeavored to book space for the onions on that line, but "could not get space" (p. 49). Plaintiff also claims that it was unaware that the "Waitotara" was to go to Vancouver before proceeding to San Francisco, until after the vessel sailed (p. 44). There is no showing in the record of any peril of the sea, stress of weather or other occurrence, which might account for the sixty-four day trip from Melbourne to San Francisco, and the

delay is unexplained, except by the circuitous route travelled.

It is settled law that where the vendor sells goods, undertaking to make delivery at a distant place, the goods are at the vendor's risk until delivered, and the carrier is the vendor's agent:

Benjamin on Sales (7th Am. ed.), Sec. 693;
Tobias v. Lissberger, 105 N. Y. 404, 12 N.
 E. 13, 59 Am. Rep. 509;

Herring-Hall-Marvin Co. v. Smith, 43 Or.
 315, 323, 72 Pac. 704;

Devine v. Edwards, 101 Ill. 138;

L. Greif & Bro. v. Schuman, 82 S. W. 533,
 534 (Tex. Civ. App.);

*Sloss-Sheffield Steel & Iron Co. v. Tacony
 Iron Co.*, 54 Pa. Super. Ct. 11.

Any delay, therefore, of the carrier, not attributable to perils of the sea, is chargeable to the shipper as an act of its agent, and the fact that, as between the shipper and the carrier, the carrier reserves the right

“to deviate from any advertised route and to touch and stay at other ports or places (although in a contrary direction to, or out of, or beyond, the ordinary or usual route to the port of discharge), once or oftener, in any order, backwards or forwards,”

as provided in the bill of lading (p. 52), is a matter of no concern to the buyer. While under such a bill of lading, which we believe to be more ingenious in phraseology than efficacious in law (see *Swift &*

Co. v. Furness, Withy & Co., 87 Fed. 345), a vessel might possibly roam about the seven seas at will for years without rendering the carrier liable to the shipper, this license to wander is a matter between plaintiff and its own agent, and in no way compels defendants, who were not parties to the contract of affreightment, to accept goods which have been shipped over the devious route followed by the "Waitotara" in the present case. So, possibly, the inability to get space on the regular line might be urged by plaintiff as an excuse for non-performance by plaintiff, but it cannot be used to compel acceptance by defendants of an unreasonably delayed delivery.

The language quoted by us from *Tobias v. Lissberger*, is particularly apt (105 N. Y. 412):

"Something more than shipment was bargained for, viz., prompt shipment, and *the delivery was to be within such time as, dangers of the sea only excepted, might reasonably follow.*"

There is no essential difference between shipment on an ice-bound vessel which could not sail on time, and shipment on a vessel which followed the route taken by the "Waitotara", going to Vancouver, nearly a thousand miles to the north of and away from the port of destination, before finally coming to San Francisco. Neither method of procedure tended to produce, or produced, a delivery within a reasonable time.

In the case of *Sloss-Sheffield Steel & Iron Co. v. Tacony Iron Co.*, 54 Pa. Super. Ct. 11, plaintiff at

Birmingham, Alabama, contracted to sell to defendant certain steel under a contract providing for shipments "during April and May" and for delivery at Tacony, Pennsylvania, the defendant's place of business. The court said:

"The agreement to deliver f. o. b. at Tacony did not mean anything less than that the goods were to be delivered to that place during April and May, or at least within a reasonable time thereafter, as the consummation of the contract. The delivery to the carrier did not divest the title of the vendor to the property, nor pass it to the purchaser, under the contract until it reached its destination, and the hazards of transportation were at the risk of the consignor.
 * * * *The court rightfully took judicial notice of the distance between Birmingham, Alabama, and Tacony, Pennsylvania, and of the time which, by any ordinary means of transportation, would be consumed in sending goods from one point to the other. The conclusion could not be other, than that eight months was a wholly unreasonable time for such transportation, and the delay in making the delivery imposed upon the seller the burden of showing that the cause of the delayed delivery was not under his control. No attempt was made to meet this demand, and the court properly entered a nonsuit.*"
 (Italics ours.)

So, in the case at bar, plaintiff has failed to meet the burden of showing that the delay in making delivery was not its fault or the fault of the carrier, which was its agent. Its only showing is one of delayed shipment and of a circuitous carriage of the goods, which may account for, but cannot excuse, the attempted delivery of the goods at least forty

days later than defendants were reasonably entitled to expect them.

We respectfully submit that the judgment of the lower court should be sustained upon all of the grounds of nonsuit urged by defendants.

Dated, San Francisco,

March 3, 1923.

CHARLES W. SLACK AND

EDGAR T. ZOOK,

Attorneys for Defendants in Error.

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No. 3898 4

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

GEORGE WILLS & SONS, LIMITED

(a corporation),

Plaintiff in Error,

vs.

WILLIAM R. LARZELERE and JOSEPH J.

SWEENEY, copartners doing business under
the firm name of Larzelere, Sweeney Com-
pany,

Defendants in Error.

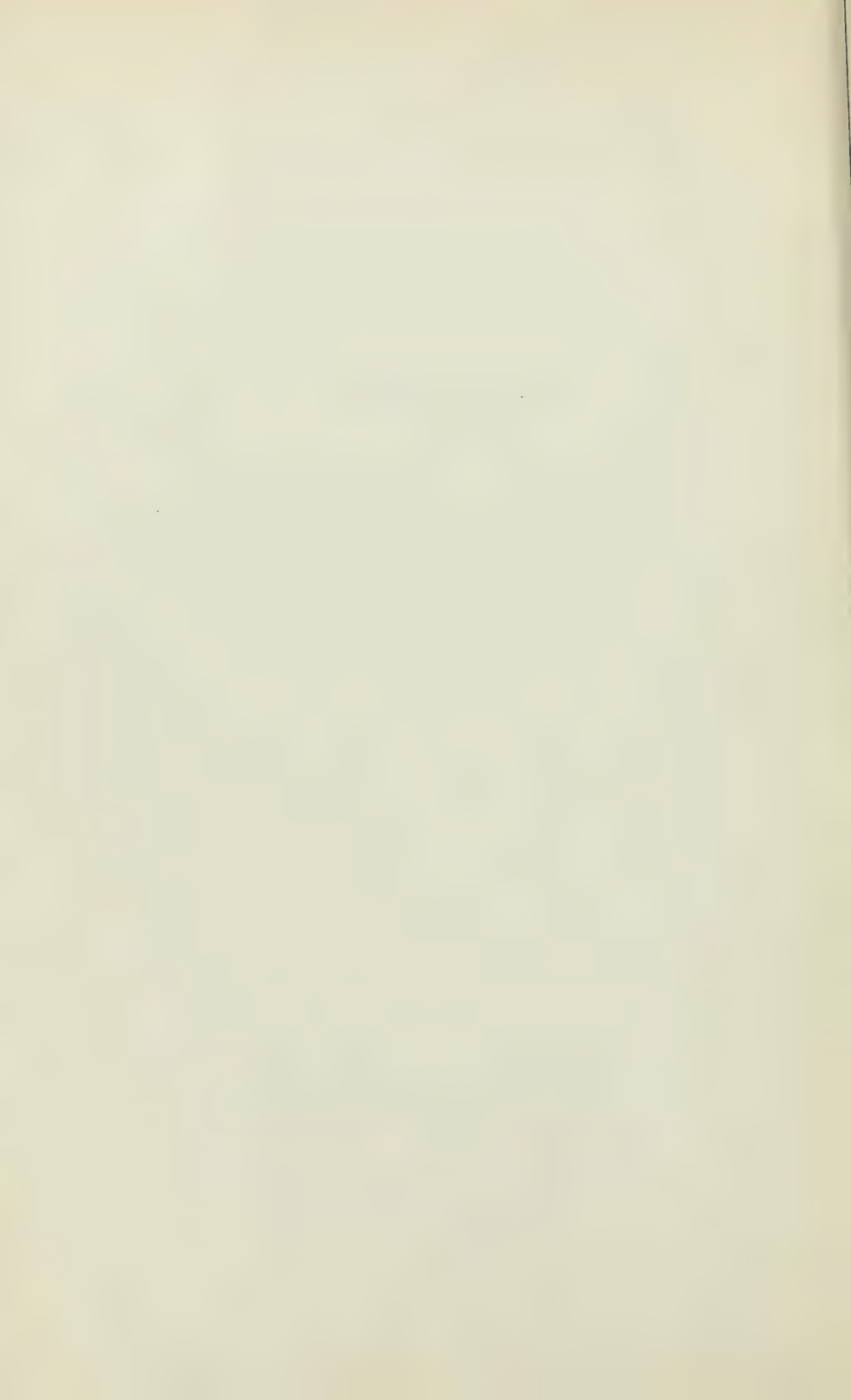
ORAL ARGUMENT OF ALFRED J. HARWOOD IN REPLY
TO BRIEF FOR DEFENDANTS IN ERROR.

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the firm name of Larzelere, Sweeney Com-
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Defendants in Error.

**ORAL ARGUMENT OF ALFRED J. HARWOOD IN REPLY
TO BRIEF FOR DEFENDANTS IN ERROR.**

* * *

Mr. HARWOOD: I shall now reply to the argu-
ment made in the brief of the defendants in error.

The court granted the motion for nonsuit on the
ground that the steamer did not depart from Aus-
tralia on March 10th. The argument of defendants
in error on this point appears at pages 17 and fol-
lowing of their brief.

Defendants in error practically concede that the
court was in error. At page 17 of their brief the
following statement is made:

“Defendants concede that if the contract had
called for ‘shipment March 10th’ merely, and

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the vessel
March 10th

the onions had been put on board on that day, the fact that the vessel did not depart from Australia for several days thereafter would not afford a valid reason for refusing to accept them on arrival. As was stated in the definitions of shipment quoted above, a provision for shipment by a certain date requires a departure *within a reasonable time thereafter* and not a clearance on the date specified."

The argument that the words "shipment to be effected from Australia by steamer on the 10th of March" mean that the steamer must depart on March 10th is obviously unsound. The plain meaning of the language used is that the shipment was to be accomplished by March 10th and the shipment was accomplished when the onions were delivered to the steamer. The language used does not, as counsel say, "call for something more than shipment."

What the contract called for was a *shipment* on March 10th, nothing more was meant—no departure of the steamer by March 10th was stipulated for.

Counsel says that the word "from" implies a departure or separation. The contract called for a shipment from Australia to San Francisco and when the goods were *shipped* they were shipped *from* Australia.

"Shipment" means the delivery of goods to the carrier for transportation *from* the place of shipment to the place of destination.

"Shipment March 10th" means exactly the same as "shipment to be effected from Australia on

March 10th.” In the contract between the parties they used a few more words to express their meaning—that is all.

Counsel cite *Tobias v. Lissberger*, 105 N. Y. 404, where the contract called “for prompt shipment by sail from Europe and for delivery on dock at the port of New York”. In that case the seller delivered the goods to a vessel at Stettin, a city on a river forty miles from the sea. *When the goods were delivered to the ship the river was ice bound.* This was not a shipment at all. Bouvier defines a shipment as

“the delivery of the goods within the time required on some vessel which the seller has reason to suppose *will sail within a reasonable time.*”

In the case cited by counsel the seller, in view of the fact that the river was ice bound, did not have reason to suppose that the ship would sail within a reasonable time.

But in the case at bar the vessel was scheduled to sail on March 10th, and no conditions existed at Melbourne which made it impossible to sail within a reasonable time after that date.

The case cited by counsel would be analogous to this case if the river had frozen up after the goods were delivered to the ship.

As said by the court in the case cited by counsel, “shipment cannot be said to have been made from Europe when the port selected has no passage way or outlet.”

The evidence shows that when the space for the onions was reserved and when they were shipped the vessel was scheduled to sail from Melbourne to San Francisco. Therefore in no event could the fact that the ship touched at Sydney be important. Even if the plaintiff had known that the vessel intended to stop at Sydney, which is in the direction of San Francisco (and the evidence shows that plaintiff did not know this when the shipment was made), such knowledge would be immaterial. The meaning of the word "shipment" itself answers this contention. *Bouvier* defines shipment as

"the delivery of the goods within the time required on some vessel which the seller has reason to suppose *will sail within a reasonable time.*"

Even if the seller had known that a vessel scheduled to sail from Melbourne on March 10th intended to stop at Sydney on its way to San Francisco, he would still have reason to suppose that the vessel would sail from Australia within a reasonable time after March 10th.

Counsel have several times used the expression "an effective shipment as called for by the contract". But the contract does not call for an "effective shipment". The proviso is merely that shipment should be effected on March 10th.

The next contention is that the onions were not put on board by March 10th.

The witnesses testified that the delivery of the onions *to the steamer* was commenced late in February and completed on March 7th.

In their reply brief counsel contend that the testimony does not show that the onions were "loaded on board" by March 10th, and in this connection it is contended that goods are not shipped until they are loaded on board.

As to the first contention. In their brief counsel say at page 12:

"when Shea testified that the delivery was completed on March 7th all that his testimony can be construed to mean is that on that day, plaintiff parted with possession of the onions, and the agents of the steamer took possession of them either on the dock, at ship's tackle or alongside the steamer, for the purpose of afterwards putting them on board."

But Mr. Shea did not testify that he delivered the onions to the agents of the steamer on the dock or alongside the ship, but that he completed the delivery of the onions *to the steamer on March 7th*.

The ordinary meaning of the language used is that the onions were put on board the steamer.

Counsel say that the case of *Baldwin v. Sullivan Timber Co.*, 142 N. Y. 279, does not bear out our claim as to the meaning of the expression "delivered to the steamer."

The case was cited as authority to the effect that the ordinary meaning of the expression "delivered to the steamer" means a loading on the vessel. The

words were given that meaning in the case cited. The fact is that this is the ordinary manner in which a loading on board is described. It is almost the universal custom to describe it in that way.

In *Scott v. The Ira Chaffee*, 2 Fed. 401, the court said:

“There is abundance of *authority* to the effect that the obligation of the cargo to the ship and of the ship to the cargo does not arise until the cargo, or some portion of it, has been loaded on board, or at least legally *delivered to the vessel*.”

In *Petersburg v. Norfolk etc. Co.*, 172 Fed. 327 (C. C. A.), the court said:

“The supply was not completed until the *delivery to the ship* where they lay.”

In *Burdoin v. The Harriet Smith*, Fed. Case No. 2147 (a) the court said:

“Giving goods to the mate of a vessel for transportation and taking his signed receipt therefor is a good *delivery to*, and binds, the vessel.”

In *The Oregon*, Fed. Case No. 10,553 (Deady, 179) the court said that where the vessel was unable to reach the wharf and the goods were delivered to a steamboat to be transported to the vessel:

“A delivery of goods under such circumstances *to the steamboat* for the purpose of being conveyed by said steamer, is a delivery *to the latter*, and she is thenceforth bound for their safe carriage and timely delivery.”

In *Campbell v. The Sunlight*, Fed. Cas. No. 2368 (2 Hughes), the court said:

“Delivery of *cargo to a lighter* for shipment on the vessel is a good delivery and binds the vessel.”

In the *Century Digest*, title “Shipping,” Sec. 411, the title of the section is “Delivery to Vessel.”

This Court in *Guffey v. Alaska P. S. S. Co.*, 130 Fed. 276, several times used the expression “delivery to the ship” and meant thereby a loading of the goods on the ship.

But counsel are entirely in error when they say that goods are not *shipped* until they are placed on board.

In order to constitute shipment is not necessary that goods be on board.

Even if counsels’ construction of the testimony quoted above were correct (and plainly it is not) there would nevertheless be a shipment before March 10th.

In *Pollard v. Vinton*, 105 U. S. 9, the Supreme Court held that when goods are delivered to the carrier although not placed on the vessel the contract of carriage has commenced and a bill of lading may be issued. The court said:

“Before the power to make and deliver a bill of lading could arise, some person must have shipped goods on the vessel. Only then could there be a shipper, and only then could there be goods shipped. In saying this we do not mean that the goods must have been actually placed on the deck of the vessel. If they came within the control and custody of the officers of the boat for the purpose of shipment, the

contract of carriage had commenced, and the evidence of it in the form of a bill of lading would be binding. But without such a delivery there was no contract of carrying, and the agents of defendant had no authority to make one."

So in this case the bill of lading could have been issued on March 7th and the fact that it was not actually issued until March 12th is immaterial.

Moreover, it is not necessary that a bill of lading be given at all—an oral contract for the carriage of the goods and the delivery of the goods to the carrier constitute a shipment.

Missouri v. Patrick, 144 Fed. 632 (C. C. A.).

In *Petersburg S. S. Line v. Norfolk Etc. Co.*, 172 Fed. 326 (C. C. A.) the Circuit Court of Appeals held (syllabus):

"The claimant owned the steamer Pokanoket, which it operated between Petersburg and Norfolk, Va. Claimant's agent at Petersburg solicited cargo and signed bills of lading; the master being a pilot, charged only with the navigation of the vessel. The agent received from libellant, *at claimant's wharf in Petersburg*, 275 bags of peanuts for carriage to Norfolk on the steamer, and issued a bill of lading therefor. Owing to a freshet, causing an obstruction in the river, the steamer could not reach the wharf, and the agent employed a lighter, which came into collision with an obstruction, and a part of the peanuts were lost and damaged before the lighter reached the steamer. Held, *that the reception of the goods at the wharf was a delivery to the vessel*, and that she was liable in rem for any loss recoverable."

The court said (p. 323) :

“The shipper fully parted with the possession of the goods when he delivered them at the wharf, and had no longer any control or right of control over them.”

The Circuit Court of Appeals quoted from *Parsons on Shipping and Admiralty*, page 183, as follows :

“The reception of the goods by the master on board the ship or at a wharf or quay near the ship, for the purpose of carriage therein, or by any person authorized by the owner or master to receive them, or seeming to have this authority by the action or assent of the owners or master, binds the ship for the safe carriage and delivery of the goods.”

The Circuit Court of Appeals also cited *Bulkley v. Cotton Co.*, 24 How. 386, where the Supreme Court held that the delivery of cotton to a lighterman was a delivery to the master. The Supreme Court said :

“There is no necessary physical connection between the cargo and the ship as a foundation upon which to rest this liability.” (The liability referred to is the liability of the ship for the loss of the goods shipped.)

The Supreme Court further said :

“We do not see why the lien may not attach when the cargo is delivered to the master for shipment, before it reaches the hold of the vessel.”

In the above case the Supreme Court held :

“No well-founded distinction can be made, as to the liability of the owner and vessel, between

the case of the delivery of the goods into the hands of the master at the wharf, for transportation on board of a particular ship, in pursuance of the contract of affreightment, and the case of the lading of the goods upon the deck of the vessel."

In *Pearce v. The Thomas Newton*, 4 Fed. 106, the court said:

"The owner of the cargo has a lien upon the ship for safe delivery of the same, as much as the ship owner has upon the cargo for freight. *The Maggie Hammond*, 9 Wall. 435. This lien begins upon the receipt of the goods for shipment. *Upon such a receipt the goods are 'shipped'*. 1 *Pars. Mar. Law*, 132 *Conk. Adm.* 151. The court therefore holds that the responsibility of the *Thomas Newton* began on Thursday, when her agents and owners received the goods."

In *The Oregon*, Fed. Cas. No. 10,553 (Deady 1, 179), the court said:

"Where a vessel is discharging and taking on cargo at a wharf, a delivery of goods thereon by the direction of the master, for the purpose of carrying upon the same, is a delivery to such vessel, and her responsibility for their carriage and delivery starts from that time."

In *Delaware v. Oregon Iron Co.*, 14 Wall. 579-602, the Supreme Court said:

"Bills of lading, when signed by the master, duly executed in the usual course of business, bind the owners of the vessel, if the goods were loaded on board, or *were actually delivered into the custody of the master*; but it is well settled law that the owners are not liable if the party

to whom the bill of lading was given had no goods, or the goods described in the bill of lading were never put on board *or delivered into the custody of the carrier or his agent.*"

Many of the cases are cited and quoted from in the decision of this court in *Guffey v. Alaska P. S. S. Co.*, 130 Fed. 271 (C. C. A.). In that case this court held that the liability of the ship for the carriage of the goods attaches when the goods are delivered to the owners in the presence of the ship. Even assuming that the testimony of Mr. Shea that he completed the delivery to the "Waitotara" on March 7th does not mean that the goods were delivered on board the vessel, it must mean that they were delivered to the owners *in the presence* of the vessel. Mr. Shea testified that he commenced to deliver the onions to the steamer late in February and that the delivery was completed on March 7th (Tr. p. 60).

In the *Guffey* case the steamer was either at Nome or on the high seas when the goods were delivered to the charterer of the vessel. The bill of lading mentioned no vessel in which the goods were to be shipped and gave the charterer the right to carry on any of the company's vessels. The company to whom the goods were delivered was not the owner of the vessel.

In *Nord Deutcher Lloyd v. President etc. of Ins. Co.*, 110 Fed. 420 (C. C. A.), the Circuit Court of Appeals held that when goods were delivered to

lighters to be delivered to the ship the bill of lading is applicable to the goods as soon as they were placed on lighters.

The definition of "shipment" in *Bouvier* refers to the delivery "on the vessel". This is a short definition. In commercial usage, in this country at least, the word "shipment" by extension has come to mean also the delivery of the goods at the wharf for loading on a specific ship.

Counsel say that the citation of 1 *Hutchinson on Carriers*, Sec. 113, is not in point

"as that section deals only with the question of when the vessel's liability as a common carrier attaches, and does not touch on the question of shipment."

Now counsel could not have reflected before they made this statement. *A vessel's liability as a common carrier never attaches until there has been a shipment.*

The distinction sought to be drawn by counsel finds no support either in reason or authority. Counsel in effect contend that when goods are delivered at the wharf into the custody of the master or owner for loading on the ship and the lien of the ship on the cargo and the lien of the cargo on the ship have attached, that there has not been a shipment because the owner has not yet put the goods on board.

Counsel's contention is directly at variance with the decision of the United States Supreme Court in

Pollard v. Vinton, 105 U. S. 9, which I have already cited and quoted from. In that case the Supreme Court directly held that goods are shipped *as soon as the power to make a bill of lading arises*, and that the power arises *when the goods come within the custody of the officers of the ship for the purpose of loading, although they may not actually have reached the deck of the vessel*. The Supreme Court said:

“Before the power to make and deliver a bill of lading could arise, some person must have shipped goods on the vessel. Only then could there be a shipper, and only then could there be goods shipped. In saying this we do not mean that the goods must have been actually placed on the deck of the vessel. If they came within the control and custody of the officers of the boat for the purpose of shipment, the contract of carriage had commenced, and the evidence of it in the form of a bill of lading would be binding.”

In the case of *Petersburg S. S. Line v. Norfolk*, 172 Fed. 326 (C. C. A.), where the goods were delivered to the wharf for loading, the Circuit Court of Appeals said:

“The shipper fully parted with the possession of the goods when he delivered them at the wharf, and had no longer any control or right of control over them.”

Certainly this constituted a “shipment”. A “shipment” must be made when the shipper delivers the goods to the ship owner for loading, parts entirely with their custody, and the lien of the ship

attaches to the goods and the lien of the goods attaches to the ship.

Counsel cite three English cases where the courts said that "shipment" meant "shipment on board".

In *Comptoir Commercial Anversoise v. Power*, 1 K. B. (1920), 868, one of the cases cited, no question arose as to when a shipment was made. The court merely said incidentally that

"giving the word 'shipment' the widest meaning of which it is capable it could mean no more than bringing the goods to the shipping port and then loading them on board a ship prepared to carry them to their contractual destination."

Moreover it appears that the British Bill of Lading Act of 1855 provides, in effect, that a bill of lading shall not be issued until the goods were "laden on board the vessel". (3 K. B. 450, 1921.)

These cases are not authority in this country in view of the decisions of our Supreme Court. Nor does it appear that any English court ever held that a delivery on the dock to the carrier for loading is not a shipment—that is where the goods are delivered to a carrier for loading on a particular ship which is in port and on which the carrier had agreed to transport the goods.

But the Privy Council of England has recently held that it is not necessary that the goods should be loaded on board the vessel, especially in a case like this where the shipment is by a "general ship" and not a ship chartered for a special bulk cargo.

The case referred to is *Marlborough Hill (ship) v. Cowan & Sons* (1921) 1 A. C. 444, where Lord Philimore said:

“Their Lordships are not disposed to take so narrow a view of a commercial document. To take the first objection first. *There can be no difference in principle between the owner, master or agent acknowledging that he has received the goods on his wharf, or allotted portion of quay, or his storehouse awaiting shipment, and his acknowledging that the goods have been actually put over the ship’s rail.* The two forms of a bill of lading may well stand, as their Lordships understand that they stand, together. *The older is still the more appropriate language for whole cargoes delivered and taken on board in bulk; whereas ‘received for shipment’ is the proper phrase for the practical business-like way of treating parcels of cargo to be placed on a general ship which will be lying alongside the wharf taking in cargo for several days, and whose proper stowage will require that certain bulkier or heavier parcels shall be placed on board first, while others, though they have arrived earlier, wait for the convenient place and time of stowage.*”

The next point is that the motion for a non-suit should have been granted because of the indirect course which the vessel followed.

Plaintiff performed its contract and is not responsible for delay caused by indirect course followed by vessel.

In their reply brief counsel here again referred to the case of *Tobias v. Lissberger*, 105 N. Y. 412, where the goods were delivered to a vessel in an ice bound port. Counsel say

“There is no essential difference between shipment on an ice bound vessel which could

not sail on time and shipment on a vessel which followed the route taken by the 'Waitotara'."

But there is all the difference in the world. In the case at bar plaintiff believed that the ship would sail direct to San Francisco on March 10th, or within a reasonable time thereafter; whereas in the *Tobias* case the seller knew that the river was frozen over and that the ship could not sail within a reasonable time. In the *Tobias* case there was *no shipment* at all.

Counsel cite *Sloss-Sheffield v. Tacony*, 54 Pa. Super. Ct. 11, where eight months elapsed between the shipment of the goods in Alabama and their arrival in Pennsylvania. This delay was not explained by the shipper. The court merely held that the delay in making the delivery imposed upon the seller the burden of showing that the cause of the delayed delivery was not under his control.

Just why this case is cited is not apparent for it is obvious that in the case at bar the route followed by the "Waitotara" was not under the control of the plaintiff. The plaintiff showed that the steamer delayed its departure for six days and followed an indirect route, but in the case cited no explanation was offered of a delay of eight months in shipping goods a few hundred miles by rail.

This superior court case is the only case discovered by counsel which even intimates that where shipment is made at the time stipulated for by the contract the delivery must be within a reasonable time after

the shipment. Such cannot be the law. In any event the case is not authority here for in this case it was shown that the plaintiff had no control over the cause of the delay.

In counsels' brief no mention is made of the cases cited in brief of plaintiff in error at page 26 *which hold that where shipment is made at time stipulated in the contract the vendee is bound to accept and pay for the goods although there was delay in delivery.*

It is immaterial whether the carrier is the agent of the seller or the agent of the buyer or whether title passes when the goods are shipped or when they are delivered at destination.

In the leading case of *Ledon v. Havemeyer*, 121 N. Y. 179, 184, cited in the brief the court declined to pass upon the question as to whether the title to the goods passed to the vendee when they were shipped or when they were delivered at destination. The court said:

“It is unnecessary to decide this question as it has no controlling influence over the signification of the word ‘shipment’ as used in the contract. That question, we think, is made clear by general usage and the uniform course of authority on the point. There is nothing in the language used in the contract, or in the surrounding circumstances, to indicate that the vendors were expected to exercise any control over the clearance of the vessel, or her subsequent management.”

In the case of *Peace River Phosphate Co. v. Graf-fin*, 58 Fed. 550, which is also cited in my brief at page 26, the contract of sale, like the contract in the case at bar, provided for payment on delivery. It was contended that the seller could not recover because of the delay in the arrival of the cargo. In overruling this contention the court said (page 551):

“The contract contains nothing as to when the delivery is to be made, but only as to the time of shipment; and the special agreement alleged in the declaration alleges an agreement with respect to the chartering and sailing of the two vessels mentioned, and not as to their arrival. It would appear, therefore, that if the shipments were made in due time, as stipulated by contract or by special agreement, the plaintiff was not responsible for delay in their arrival.”

No. 3898 5

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

GEORGE WILLS & SONS, LIMITED,
(a corporation),

Plaintiff in Error,

vs.

WILLIAM R. LARZELERE and JOSEPH J.
SWEENEY, copartners doing business under
the firm name of Larzelere, Sweeney Com-
pany,

Defendants in Error.

**REPLY OF DEFENDANTS IN ERROR TO
ORAL ARGUMENT OF A. J. HARWOOD.**

CHARLES W. SLACK and
EDGAR T. ZOOK,

Attorneys for Defendants in Error.

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Counsel for plaintiff in error, in his oral argument, not only fails to meet the points raised by defendants' brief, but he makes several statements which are not warranted by the facts or inferrible from our argument or from the cases cited.

On the first page of his argument, counsel states that

“defendants in error practically concede that the court was in error.”

To support this statement, counsel says (Oral Arg., pp. 2-3):

“ ‘Shipment March 10th’ means exactly the same as ‘shipment to be effected from Australia on March 10th’. In the contract between the parties they used a few more words to express their meaning—that is all.”

This statement is not argument. It is simply a claim that the words “to be effected from” have no meaning or, at least, no importance. The case of *Tobias v. Lissberger*, 105 N. Y. 404, is in point. It was there expected that, although the vessel on which the goods were shipped was ice-bound, the ice would break up in March (105 N. Y. 409), but the ice did not break up until April second or third. In the case at bar, plaintiff says it expected the “Waitotara” to sail from Melbourne direct to San Francisco (Tr., pp. 43-44) on March 10 (p. 45). The “Waitotara”, as we have already shown, did not sail until March 16th, and took the indirect route which we have already described. In both cases, the duty to deliver was on the shipper and the carrier was the shipper’s agent. In *Tobias v. Lissberger*, the Court said that in providing for *prompt shipment*, the parties contemplated

“expedition, or immediate and effective, or beneficial shipment as a step towards delivery” (105 N. Y. 412).

So here we say that we contemplated expedition, and so provided for shipment “to be effected from Australia” on the date mentioned, thus using lan-

guage implying a departure as a step towards delivery.

On the hearing, counsel cited a number of cases, not contained in his opening brief, which we had not expected to discuss, because they did not bear on the question before the Court. We stated on the hearing that we believed they did not touch upon the meaning of the word "shipment", and that they had to do simply with the mutual relations between the carrier and the shipper and the determination of the time when such relations commence. An examination of these authorities will show that we were correct in this statement. In every one of them, the point at issue was whether or not, under the circumstances of the particular case, the liability of the ship as a carrier had attached.

In *Scott v. Ira Chaffee*, 2 Fed. 401, the question involved was as to whether the owner of a cargo had a lien on a vessel for the breach of a contract of affreightment, where the cargo had never been laden on board or delivered to the master.

In *Petersburg v. Norfolk etc.*, 172 Fed. 321, the question was as to the liability of the vessel for goods delivered to the dock, receipted for by the agents of the vessel and injured while on lighters prior to loading on board.

In *Bourdoin v. The Harriet Smith*, Betts. Scr. Bk. 25, 4 Fed. Cas. 722, it was merely held that a receipt by the first mate of a vessel for cigars was a good delivery and bound the vessel.

In *The Oregon*, 1 Dedy 179, 18 Fed. Cas. 760, delivery to a vessel used as a lighter for the steamship "Oregon" was shown, and it was held that such a delivery bound the latter vessel for the safe carriage of the goods.

In *Campbell v. The Sunlight*, 2 Hughes 9, 4 Fed. Cas. 1187, goods were delivered to a lighter in charge of the vessel and a receipt was given therefor by the master. The vessel was held liable for their loss from the lighter.

In *Guffey v. Alaska Pacific Steamship Co.*, 130 Fed. 271, this Court affirmed a decree dismissing a libel against a vessel, upon the ground that, at the time of the delivery of the goods to the dock for shipment, the vessel was not at the dock and the goods were never received by the master thereof. While counsel states (Oral Argt., p. 7) that, on page 276 of that decision,

"this Court several times used the expression 'delivered to the ship' and meant thereby a loading of the goods on the ship",

we are unable to find any language of the Court which is susceptible of the construction claimed by counsel. On the other hand, we find a reference on page 276 to a loss of goods

"before being received on board or coming under the control of the master".

We also find on the same page a statement that

"there can be no delivery to the ship, in the maritime sense, either of supplies or cargo, so as to bind her in rem, *until the goods are*

actually put on the ship or else brought within the immediate presence or control of her officers.” (Italics ours.)

These statements would seem to indicate that the Court had clearly in mind the distinction between the delivery to the vessel and a loading of the goods on the ship.

In *Pollard v. Vinton*, 105 U. S. 7, the Supreme Court held that a vessel could not be bound by a bill of lading, given by the agents of the owner, for goods which were never delivered to the vessel. The Court there clearly recognized the distinction between shipment and delivery for shipment when it said on page 7 of its opinion that

“no cotton was shipped on the steamboat or delivered at its wharf or to its agent for shipment.” (Italics ours.)

The passage from the opinion quoted by counsel (Oral Argt., pp. 7-8) again shows the preservation of the distinction between delivery and shipment. The Court was there discussing the time when the contract of carriage commences (105 U. S. 9) and said:

“Before the power to make and deliver a bill of lading could arise, some person must have shipped goods on the vessel. Only then could there be a shipper and only then could there be goods shipped.”

Realizing, perhaps, that the statement in these two sentences might perhaps be construed to limit

the liability of the vessel to cases where the goods were actually shipped, the Court continued as follows:

“In saying this, we do not mean that the goods must have been actually placed on the deck of the vessel. If they came within the control and custody of the officers of the boat for the purpose of shipment the contract of carriage had commenced.”

In *Bulkley v. Naumkeag Steam Cotton Co.*, 24 Howard 386, the Supreme Court held a vessel liable for cotton delivered to a lighter and lost prior to being loaded on board. Counsel has quoted a passage from its opinion (Oral Argt., p. 9), which again shows the distinction between delivery and shipment (24 How. 394):

“We do not see why the lien may not attach when the cargo is delivered to the master *for shipment* before it reaches the hold of the vessel.”

The Delaware, 14 Wall. 579, also refers both to loading on board and to delivery to the master, holding the liability of the vessel to attach in either instance.

From these decisions, counsel concludes, by some process of reasoning which, we must confess, we are at a loss to follow, that

“a vessel’s liability as a common carrier never attaches until there has been a shipment.”

The rule is, of course, that a vessel’s liability never attaches until there has been *either a delivery*

to the master or to the agent of the vessel *or a shipment*, and such is the holding of all of the cases cited by counsel. If delivery to the vessel and shipment were one and the same thing, why should the opinions repeatedly use both terms, in the alternative, and refer both to "loading goods on board" and to "delivery for shipment"?

The case of *Pearce v. The Thomas Newton*, 41 Fed. 106, is the only case cited by counsel which fails to recognize the distinction between the delivery to the master and shipment, and the statement quoted therefrom to the effect that, upon receipt of the goods for shipment, the goods are "shipped", was neither necessary to the decision nor borne out by the citations in support thereof. *Parsons on Maritime Law* was a text published in 1859, which the author afterwards expanded into the work known as *Parsons on Shipping and Admiralty*, and the passage that appears on page 152 of the earlier work, referred to in the decision in *Pearce v. The Thomas Newton*, is identical in language with the passage in the later work appearing on page 183 thereof, and quoted on page 9 of appellant's oral argument. *Conklin on Admiralty*, page 151, also cited in *The Thomas Newton* case, is practically the same in substance as the quotation from *Parsons'* works. In neither case is the meaning of the words "shipped" or "shipment" discussed.

We cannot account for the statement of counsel, appearing on page 14 of his oral argument, to the following effect:

“Nor does it appear that any English court ever held that a delivery on the dock to the carrier for loading is not a shipment—that is, where the goods are delivered to a carrier for loading on a particular ship which is in port and on which the carrier had agreed to transport the goods.”

The case of *J. Aron & Co. v. Comptoir Wegimont*, (1921) 3 K. B. 435, cited by us in our brief, holds exactly what counsel claims no English Court has ever held. The facts in that case are set forth at pages 436 and 437 of the opinion as follows:

“The sellers were prevented through a strike of longshoremen and others from actually shipping the goods on board the steamship Idaho or any other steamship in October. They had, however, delivered the goods to a dock on October 8, 1919, and they received a receipt which (so far as material) is as follows: ‘New York October 8 1919. Cargo received for steamship Idaho on account J. Aron & Co. 772 cases cocoa powder.’ Signed ‘Frank Williams, receiving clerk.’ Frank Williams was apparently the receiving clerk for that vessel.”

Upon these facts, the Court said (p. 438):

“I take in order the questions argued before me. The first was this—namely, whether the goods were ‘shipped’ in October. Mr. van den Berg, for the sellers, vigorously argued that shipment in October had actually taken place by reason of delivery at the dock to the agents of the ship in the manner I have stated.”

And later the Court said (p. 438):

“In my opinion, those facts do not show shipment in October, 1919, as required by the con-

tract. *Delivery at docks to the agents of a ship for the purpose of future shipment is not the same thing as an actual shipment on board.*" (Italics ours.)

The case of *Marlborough Hill (Ship) v. Cowan & Sons*, (1921) 1 A. C. 444, cited by counsel, has nothing whatsoever to do with the question of when goods are shipped or what constitutes shipment. The point which the Court was discussing in the passage quoted by counsel (Oral Argt., p. 15) was whether or not, under the Bills of Lading Act of 1855 (18-19 Vict., c. 111), the assignee of a document purporting to be a bill of lading, but reciting that goods were "*received for shipment*" instead of "*received on board*", could sue in his own name, and all that the Court held was that, so far as the assignability of such an instrument was concerned, there was no valid reason why such a document should not be deemed to be assignable within the meaning of the act above referred to.

Again counsel's quotations refute his contentions. In the passage quoted, the Court refers to the receipt of goods on the wharf, quay or storehouse "awaiting shipment" as distinguished from an acknowledgment that the goods have been "actually put over the ship's rail", and states that,

"'*received for shipment*' is the proper phrase for the practical, business-like way of treating parcels of cargo to be placed on a general ship which will be lying alongside the wharf taking in cargo for several days, and whose proper stowage will require that certain bulkier or

heavier parcels shall be placed on board first, while others, though they have arrived earlier, wait for the convenient place and time of stowage." (Italics ours.)

We are grateful to counsel for the citation of this authority, which bears out our contention that, in all probability, the onions in the case at bar, though *delivered to the ship on May 7th* as Shea testified, were *not shipped until March 12th*, the date of the bill of lading. They were probably waiting "the convenient place and time of stowage".

The remaining portion of counsel's brief is an attempt to excuse the delay in arrival of the goods upon the ground that plaintiff thought the vessel was going to sail direct from Melbourne to San Francisco, and that defendant had no control over the vessel after its departure. Counsel wholly failed to answer, and, indeed, cannot answer, our contention that, the vessel being the agent of the owner for the purpose of the delivery, plaintiff, and not the defendant, was responsible for, and must take the consequences of, any unexplained and unreasonable delay in the delivery of the goods.

The case of *Peace River Phosphate Co. v. Grafflin*, 58 Fed. 550, is readily distinguishable from the case at bar. From the opinion in that case, which involved a demurrer to various pleas set up in defendant's answer, it appeared that the vessels upon which the goods were to be delivered were selected by agreement between both parties. Had we se-

lected the "Waitotara" as the vessel upon which the onions in the case at bar should be shipped to us, the case cited by counsel might possibly be in point.

In *Hardesty v. Pittsburg Steel Co.*, 28 Ky. Law Rep. 367, 89 S. W. 360, the duty of the seller ceased on delivery to the railroad, as there was no obligation on its part to deliver at destination. The case of *Hawes v. Lawrence*, 4 N. Y. 345, also cited by counsel in his opening brief, holds that the time of sailing is not a warranty. The case was decided in 1850, and has been overruled by *Ledon v. Havemeyer*, 121 N. Y. 179.

We respectfully submit that the judgment of the lower Court should be affirmed.

Dated, San Francisco,
March 28, 1923.

CHARLES W. SLACK and
EDGAR T. ZOOK,
Attorneys for Defendants in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.
(IN FOUR VOLUMES.)

DAVID TAYLOR,

Appellant,

vs.

NEVADA HUMBOLDT TUNGSTEN MINES COMPANY,
a Corporation, TUNGSTEN PRODUCTS COMPANY,
a Corporation, MILL CITY DEVELOPMENT COM-
PANY, a Corporation, W. J. LORING, C. W POOLE,
R. NENZEL, H. J. MURRISH, L. A. FRIEDMAN,
C. H. JONES, G. K. HINCH, J. T. GOODIN, V. A.
TWIGG, J. C. HUNTINGTON and LENA J. FRIED-
MAN, Individually,

Appellees.

VOLUME I.
(Pages 1 to 352, Inclusive.)

Upon Appeal from the United States District Court for the
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In the District Court of the United States, in and
for the District of Nevada.

Honorable E. S. FARRINGTON, Judge.

No. B.-7.

DAVID TAYLOR,

Plaintiff,

vs.

NEVADA HUMBOLDT TUNGSTEN MINES
COMPANY, a Corporation, et al.,

Defendants.

Statement of Evidence.

VOLUME I.

APPEARANCES:

Mr. GEORGE B. THATCHER, for Plaintiff.

Mr. H. R. COOKE, for Defendants, Nevada
Humboldt Tungsten Mines Company, et al.

Mr. JOHN F. DAVIS and

Mr. CHARLES R. WHEELER, for Defendant,
W. J. Loring.

Lodged in clerk's office Feb. 18, 1922.

E. O. PATTERSON,

Clerk.

By O. E. Benham,

Deputy.

Settled and filed June 9, 1922.

E. O. PATTERSON,

Clerk.

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In the District Court of the United States, in and
for the District of Nevada.

No. B-7.

DAVID TAYLOR,

vs.

NEVADA HUMBOLDT TUNGSTEN MINES
COMPANY, a Corporation, TUNGSTEN
PRODUCTS COMPANY, a Corporation,
HILL CITY DEVELOPMENT COMPANY,
a Corporation, W. J. LORING, C. W.
POOLE, R. NENZEL, H. J. MURRISH, L.
A. FRIEDMAN, C. H. JONES, G. K.
HINCH, J. T. GOODIN, V. A. TWIGG, J.
C. HUNTINGTON and LENA J. FRIED-
MAN, Individually,

Defendants.

This case came on regularly for trial in the above-entitled court on Tuesday, September 14th, 1920, at 10 o'clock A. M., before the Honorable E. S. Farrington, Judge of said court;

Mr. George B. Thatcher, appearing as attorney for plaintiff; Mr. H. R. Cooke, appearing as attorney for defendants, Nevada Humboldt Tungsten Mines Company, et al., and Mr. John F. Davis and Mr. Charles S. Wheeler, appearing as attorneys for defendant W. J. Loring;

Whereupon the following proceedings were had and testimony introduced: [5—1]

The COURT.—You may proceed, Mr. Thatcher.

Mr. COOKE.—If the Court please, I wish to amend the separate answer of the defendants Nevada Humboldt Tungsten Mines Company, and others, on page 3; counsel has kindly consented that the matter may be presented without notice.

The COURT.—In which case?

Mr. COOKE.—It is in B-7. Page 3, Line 22, by striking out the words “except Poole, Nenzel and L. A. Friedman.” It is possibly one of those things that occurs in the drafting of pleadings as voluminous as these, and was included there rather by inadvertence than design. My witnesses tell me that is not the fact, and I desire to amend to conform to what they state is the fact. It is in response to the allegation of the complaint that the matters alleged in that particular paragraph, namely, the conditions of the property, were peculiarly within the knowledge of certain defendants; and in the answer they deny that it was within the knowledge of any of the defendants excepting these three; but I find on further examination of the witnesses that they have no peculiar knowledge or information of the subject matter embraced in the allegations to which this answer is responsive; hence we desire to have that corrected, and those words stricken out.

The COURT.—Any objection?

Mr. THATCHER.—Well, I don't know, if your Honor please. I based some of my proof in line of my case, on the proposition that it was admitted that Poole, Nenzel and Friedman had knowledge of the mine, and that the mine developments were

within the knowledge, the general knowledge or peculiar knowledge, of these three defendants; but of course if it not the truth it necessarily will have to be amended. [6—2]

Mr. COOKE.—It is not the truth.

The COURT.—The amendment will be allowed.

Mr. THATCHER.—Now what is the understanding, Mr. Cooke?

Mr. COOKE.—That the words, “except Poole, Nenzel and L. A. Friedman,” lines 22 and 23, page 3 of the answer, be stricken.

Mr. THATCHER.—With reference to the trial of the cases, may we stipulate that both cases be tried together; that the case of David Taylor vs. Nevada Humboldt Tungsten Mines Company, Tungsten Products Company, Mill City Development Company, W. J. Loring, C. W. Poole, R. Nenzel, H. R. Murrish, L. A. Friedman, C. H. Jones, G. K. Hinch, J. T. Goodin, V. A. Twigg, J. C. Huntington and Lena J. Friedman.

The COURT.—That is B-7.

Mr. THATCHER.—That that case be tried with the case of David Taylor vs. C. W. Poole, R. Nenzel, M. J. Murrish, L. A. Friedman, C. H. Jones, G. K. Hinch, J. T. Goodin, V. A. Twigg, J. C. Huntington, and Lena J. Friedman, No. 2263.

Mr. WHEELER.—That is a stipulation into which we cannot enter, as we consider our interest is entirely separate and distinct, and would be prejudiced by such a proceeding. Perhaps it would be well to call your Honor’s attention at this time to the situation of the record. There are two

suits brought here, B-1 and B-7, to which Mr. Loring is a party defendant. B-1 is a suit on which it is sought to set aside and cancel an alleged cloud upon the title of the corporation, Nevada Humboldt Tungsten Mines Company, certain transactions in the shape of contracts and deeds.

Mr. THATCHER.—I will say if counsel does not desire to stipulate, there is no use in arguing the question.

The COURT.—I don't see how those cases can be tried together unless you consent. [7—3]

Mr. THATCHER.—I think they can be tried together, but if counsel objects.

The COURT.—If there is an objection, I will not make an order that they be tried together, nor those two.

Mr. WHEELER.—That still leaves the question whether the other two should be tried together, and what I was about to say will have its bearing there, as though the other matter were before you.

The COURT.—Are you interested in the other two?

Mr. THATCHER.—I don't ask that the other two be tried together.

The COURT.—I understand from your objection, that in one of these cases you are not interested?

Mr. WHEELER.—One is an action at law for damages, to which we are not a party. Counsel has asked that we stipulate with regard to that, and we will not consent. So far as the other two cases are concerned, the question now before your

Honor is as to the order in which they should be tried.

(Argument by Mr. Wheeler.)

Mr. WHEELER.—The last case, B-7, should be tried first, in order that the injunction and temporary restraining order may be set aside, and that the corporation may act for our benefit, for use in case B-1, and that, I submit, should be the order of the trial.

Mr. THATCHER.—Well, that is the order of trial that I would like to have your Honor hear the cases.

The COURT.—Then you are agreed?

Mr. THATCHER.—Yes, we are agreed.

The COURT.—Then case B-7 will be tried first. You may proceed.

Mr. WHEELER.—At this stage of the proceedings, I call your Honor's attention to the fact that in the answer of the defendant Loring, the allegation is made that the bill is without equity, and that it is moved that the action be dismissed. Ordinarily a technical objection of this sort, seeming so at least, an objection at law, would very properly be relegated to a later decision in the case, there to be passed upon; but I respectfully submit that the question is one which should now be passed upon, and if we are correct, that Mr. Loring should be hence dismissed, and not [8-4] compelled to wade through a long trial, and its attendant costs and expenses; if it is a palpable proposition, perfectly evident and perfectly clear that this action cannot be maintained,

then the legal objection, I submit, should have its full force and effect, and the action should not proceed further.

(Argument by Mr. Wheeler.)

Mr. COOKE.—If your Honor please, in behalf of the defendants represented by myself, the Nevada Humboldt Tungsten Mines Company and other defendants, except Mr. Loring, a notice of motion was made and filed before the hearing on the show cause order some time ago, for a dismissal of the bill for want of equity, in which these propositions urged by Mr. Wheeler, together with others, were then urged upon the Court. A motion was made pursuant to that notice, and submitted, and I would like the record to show that we renew the motion at this time, and ask that the motion be considered in connection with the motion made by Mr. Wheeler on behalf of Mr. Loring. We think that all the reasons advanced by Mr. Wheeler are equally applicable to the defendants represented by us, with some slight variations, which are perhaps not material. Upon the show cause hearing we urged upon your Honor the question of want of mutuality, the want of possibility of performance of the contract, and those matters are renewed now. I don't think it is necessary for me to take up any time by way of attempted enlargement upon what Mr. Wheeler has said as to those features, because I believe it is quite sufficient for the purpose; but I would like to have the record show at this time, in pursuance of the notice heretofore given, we renew the motion for

a dismissal of the defendants, aside from Mr. Loring, and ask that the same reasons be applicable to our case as Mr. Wheeler has advanced on behalf of Mr. Loring. [9—5]

(Argument.)

The COURT.—I will declare a recess now, and will dispose of the motion at the end of the recess.

(Recess at 11:40 A. M. until 1:30 P. M.)

AFTER RECESS. 1:30 P. M.

The COURT.—I have examined the contract, gentlemen, and it seems to me that Taylor's obligation is to secure by borrowing for the three defendant corporations a sum of money sufficient to liquidate their indebtedness, estimated at \$220,000. The undertaking of the other parties to this contract is to transfer and deliver to Taylor a certain percentage of capital stock held by them in the three corporations named as defendants in the present case, when he, Taylor, has secured the sum of money necessary to liquidate the indebtedness of the three corporations. The consent of the three companies to receive or consummate the loan, or to issue preferred stock as security for the loan, is in no manner made a condition precedent to the delivery of the stock. This is clearly indicated in the last clause of paragraph 2, where it is stipulated that "a deposit of the amount necessary to liquidate the indebtedness as herein provided in the Wells Fargo Nevada National Bank shall be sufficient evidence of the conditions herein for the

transfer and delivery of the stock as herein provided."

Paragraph E has been referred to as authority for the proposition that Taylor should not only secure a sufficient sum of money to liquidate the indebtedness of the company, but the loan to the company should be actually consummated before he would be entitled to a delivery of the stock. [10—6]

An examination of that Paragraph shows that it refers to the contract of which it forms a part, Exhibit "C," and also to the option of January 16, 1919, in which Taylor was granted a right to purchase all of the stock issued by the defendant corporations, then owned by the individual defendants in the present suit, provided the option was exercised prior to July 16, 1919, Exhibit "B."

In the same paragraph it is also provided that both agreements, to wit, Exhibit "B" and Exhibit "C," shall expire June 16, 1919, and that they, that is, Exhibit "B" and Exhibit "C," shall be of no further force or effect if Taylor "shall not have negotiated the loan and secured the money provided in Paragraph 1."

The use of the term "negotiated the loan" instead of "loans" followed by "secured the money," is significant, and suggests that the parties may have had in mind a borrowing by Taylor rather than the loan to each company, of money sufficient to liquidate its indebtedness.

The provision in the contract that a deposit in the Wells Fargo Nevada National Bank of the

money necessary to liquidate the debts of the corporations would be sufficient evidence of performance for the transfer of the stock, could have been inspired by no other thought than to protect Taylor against the very interpretation of the contract now insisted upon by counsel. It is the parties of the second part who covenant and agree to turn over the stock to Taylor. They control the stock and they also control the corporations. If plaintiff's performance is not full performance within the meaning of the contract, until it is supplemented by acceptance and consummation of the loans by each of the corporations, then it would appear that Mr. Taylor has incurred an obligation which cannot be performed without the co-operation and assistance of the individual defendants themselves. This is [11—7] unreasonable, and I think not a fair interpretation of the contract, Exhibit "C."

In deciding this motion I am assuming that plaintiff has fully performed the contract, as he has alleged in his complaint. In my judgment, the raising by Taylor of a sufficient amount of money to satisfy the indebtedness of the three corporations, and the delivery of the specified amount of stock to him, constitute an agreement severable from the remainder of the contract, and susceptible of specific performance; therefore I overrule the motion.

Mr. COOKE.—Will the Court allow us an exception.

Mr. WHEELER.—Both parties defendant.

Mr. THATCHER.—Call Mr. Taylor. [12—8]

Testimony of David Taylor in His Own Behalf.

DAVID TAYLOR, the plaintiff, called as a witness in his own behalf, after being sworn, testified as follows:

Direct Examination by Mr. THATCHER.

Question.—What is your name?

Answer.—David Taylor.

Q. Where do you reside, Mr. Taylor?

A. Denver.

Q. What state? A. Denver, Colorado.

Q. Are you a citizen of Colorado? A. I am.

Q. How long have you been a citizen and resident of Colorado? A. Since 1916.

Q. Do you know the Nevada Humboldt Tungsten Mines Company? A. I do.

Q. Are you familiar generally with its property?

A. Yes.

Q. Have you been to the property of the Nevada Humboldt Tungsten Mines Company?

A. I have.

Q. Where is the property situated?

A. Seven or eight miles off the main line of the Southern Pacific at Mill City, Nevada.

Q. When did you first become acquainted with the Nevada Humboldt Tungsten Mines Company and its subsidiary, and their mining property?

A. The beginning of January 1919.

(Testimony of David Taylor.)

Q. Under what circumstances did you become acquainted with them?

A. They were brought to my attention by Mr. Howland Bancroft.

Q. Who is Mr. Bancroft?

A. A mining engineer.

Q. After the company and its properties were brought to your attention by Mr. Bancroft, did you have any dealings with the corporations, or their stockholders? A. I did. [13—9]

Q. Where? A. In San Francisco.

Q. What was the result of the negotiations or dealings which you had at that time?

A. There were two contracts entered into, one providing for the advance of certain moneys by me as against tungsten concentrates shipped by the mine; the other contract gave me an option on the purchase of the property.

Q. Have you those contracts? A. I have.

Q. I call your attention to a paper which is dated the 17th day of January, 1919, and ask if you have ever seen that before? (Hands to witness.)

A. I have.

Q. Was that contract executed by you?

A. It was.

Q. And was it executed by the corporation?

A. It was.

Q. What company?

A. Nevada Humboldt Tungsten Mines Company, by L. A. Friedman, president, by R. Nenzel, secretary.

(Testimony of David Taylor.)

Q. What was the name of the other company?

A. Tungsten Products Company, L. A. Friedman, president, R. Nenzel, secretary, L. A. Friedman, trustee.

Q. Is that the one you referred to as the ore buying contract? A. It is.

Mr. THATCHER.—We offer it in evidence.

Mr. WHEELER.—It seems to me both contracts, Exhibits “A” and “B,” are admitted by the pleadings. I don’t think it is necessary to encumber the record with them.

Mr. THATCHER.—I merely want to identify them, and keep the record straight. They are offered, if the Court please.

The COURT.—If they are both admitted, what is the necessity of introducing them?

Mr. THATCHER.—I don’t know whether they are admitted or not.

Mr. WHEELER.—I do.

Mr. COOKE.—There is no question about the contracts anyway. [14—10]

The COURT.—You admit the execution, and also the terms of the contracts, as they are alleged in the pleading?

Mr. COOKE.—Yes, sir.

Mr. THATCHER.—(Q.) After you entered into these contracts, Mr. Taylor, did you inform the defendants, or any of them—I am speaking now particularly of the option—as to whether or not you were going to exercise the option contract?

A. Yes.

(Testimony of David Taylor.)

Q. I call your attention to—I would like to have counsel produce the original unless you admit this is a copy—a letter dated February 24th, addressed to R. Nenzel, Esq., secretary of the Nevada Humboldt Tungsten Mines Company, signed by David Taylor.

Mr. COOKE.—Let us see it, Mr. Thatcher, and we can tell.

(The letter is handed to Mr. Cooke.)

Mr. COOKE.—I notice you have the date on here, Mr. Thatcher, New York; the original that I have before me the date line is Denver, do you know anything about whether it was written from New York or Denver?

Mr. THATCHER.—No, I do not, I can find out. If you have the original, I would like to have it.

Mr. COOKE.—I think that is the original, Mr. Thatcher. (Hands letter to counsel for plaintiff.)

Mr. THATCHER.—Q. Is this the letter which you wrote at that time? (Handing letter to witness.)

A. It is. The date—

Q. Never mind. I will ask the question.

Mr. WHEELER.—I would like to object on behalf of my client on the ground that it is irrelevant, incompetent and immaterial; it does not prove the issues tendered by you, and as to us, is hearsay. It seems to be a notice written to a secretary of a [15—11] corporation, not in response to the allegations found on page 5 of your complaint.

(Testimony of David Taylor.)

Mr. THATCHER.—Well, we offer it in evidence, if the Court please.

Mr. COOKE.—We make the same objection. This is a notice to the secretary of the corporation, and not to these parties who entered into this agreement, and the stockholders.

Mr. WHEELER.—Your Honor will observe the contract with respect to the stock was signed by individuals; here is a notice purporting to be addressed to one individual, secretary of the corporation, and it does not correspond to this allegation: "That on or about the month of March, 1919, plaintiff informed the defendants Friedman, Poole, Lena J. Friedman, Huntington, Nenzel, Jones, Hinch, Goodin, Twigg and Murrish that it was probable that the plaintiff would not be able to exercise his option to purchase said interests of the defendants in said corporations under said contract of January 16th." Here is a notice purporting to be to the officer of the corporation, not a party to the contract, in his official capacity, and is not a notice to any individual.

Mr. THATCHER.—Well, it at least notifies the defendant, the Nevada Humboldt Tungsten Mines Company, as to the situation. It certainly puts upon notice Mr. Nenzel, who is the secretary, whether he acquires this notice in his individual capacity, or as secretary.

The COURT.—You don't allege any notice to the company, do you?

(Testimony of David Taylor.)

Mr. THATCHER.—We don't allege any notice to the company, no.

The COURT.—Well, I will admit it subject to the objection.

Mr. THATCHER.—I am going to offer a number of letters, and I will read them all later.

The COURT.—You don't allege any notice to Mr. Loring, do you? [16—12]

Mr. THATCHER.—No, not so far as this is concerned. This is preliminary, showing what led up to other transactions.

Mr. WHEELER.—If it is of any consequence it would be a defense to Mr. Loring as well as anybody. Mr. Loring's interests are affected if this contract is enforced; therefore every item going to specific performance affects him.

The COURT.—It will be admitted for what it is worth, subject to the objection.

Mr. COOKE.—There are a number of paragraphs not going to the question of notice.

Mr. THATCHER.—It is offered for all purposes. I don't restrict it.

Mr. COOKE.—We would like to have the benefit of an exception to the ruling in the record.

The COURT.—The order admitting it, so far only admits it for the purposes for which it was offered, for notice, and that notice appears to be given in the first paragraph—the first two sentences in the first paragraph; the rest is not admitted.

(Letter dated February 24th is marked Plaintiff's Exhibit No. 1.)

(Testimony of David Taylor.)

Mr. WHEELER.—In the interest of time, your Honor, will it be agreeable to you, and to opposing counsel, when objection is made by either counsel for defendant, it will be deemed as made for the benefit of each and all of the defendants, jointly and severally, as the case may be; and also any adverse ruling may be deemed excepted to, without the necessity of taking a formal exception at the time?

Mr. THATCHER.—If that is satisfactory to the Court it is satisfactory to me.

The COURT.—Very well.

Mr. THATCHER.—(Q.) Mr. Taylor, before sending that letter, [17—13] and after you were in San Francisco and had entered into the contracts, which you have called the ore buying contract and the option contract, did you do anything else with reference to the mines? A. I did.

Q. What did you do?

A. I engaged Mr. Howland Bancroft to examine the mine, and I went to New York for the purpose of selling concentrates, and investigating the tungsten market, checking up my previous knowledge of it.

Q. After you sent Mr. Bancroft to the mine, did he make any report on the mine? A. He did.

Q. Did you receive that report from Mr. Bancroft? A. I did.

Q. About what time did you receive that report?

A. About February 20th.

Q. Where were you when you received it?

(Testimony of David Taylor.)

A. In New York.

Q. Had you previously received information from Mr. Bancroft by telegram, letter, or otherwise, as to the general contents of the report, or what the situation was?

A. I think the day before that, or two days before, I had received a telegram from my office in Denver, stating merely the tonnage of ore that was blocked out.

Q. As shown by the Bancroft report? A. Yes.

Q. And then about the 24th, you sent the letter to which I called your attention? A. I did.

Q. I call your attention to a letter on the letter-head of the Nevada Humboldt Tungsten Mines Company, and ask you if you have ever seen that letter before? A. I have.

Q. Whose signature is to that letter?

A. R. Nenzel.

Mr. WHEELER.—What date, please?

Mr. THATCHER.—February 14, 1919. (Q.) Calling your attention to that letter, I notice some pencil marks on it, were they on it at the time you received it? A. They were not. [18—14]

Mr. THATCHER.—I offer it in evidence, if the Court please.

Mr. WHEELER.—Objected to as incompetent, irrelevant and immaterial; it appears that it is not a representation binding upon the parties to the contract in question; moreover, it appears that it was not sent at a date prior to the making of Mr. Bancroft's report, the first report to the plaintiff;

(Testimony of David Taylor.)

Bancroft being an independent investigator, investigating the property on his own account.

Mr. COOKE.—I wish to add to that objection the further point that whatever representation this is, it was made long anterior to any alleged representations of the April contract, not in view of the contract, and therefore was not made for the purpose of inducing Mr. Taylor to enter into the contract as alleged.

Mr. WHEELER.—I am not sure that I made one of my objections clear. This seems to be signed by Mr. Nenzel; it is on the letter-head of the company; it is either a representation of the company, or of Mr. Nenzel personally; if a representation of the company it would be hearsay as to all the other parties; if made by Mr. Nenzel it would not be binding on any person unless it is shown that Mr. Nenzel made it with authority, and that would apply to each and every defendant other than Mr. Nenzel. There is no charge here that Mr. Nenzel alone, on his own account made any representations which resulted in this contract.

The COURT.—I will admit that. It will be admitted as against Mr. Nenzel for the present.

Mr. THATCHER.—It is admissible as against Mr. Nenzel, and before I get through I think your Honor will find these are all admissible as against all of the parties, because I believe we will bring all of this home to all of the defendants, but it is certainly admissible as against Mr. Nenzel. I offer

(Testimony of David Taylor.)

it in evidence and ask that it be given the proper marking. [19—15]

(Letter dated February 14, 1919, marked Plaintiff's Exhibit No. 2.)

Mr. THATCHER.—(Q.) I call your attention to a letter dated February 24, 1919, on the stationery of the Nevada Humboldt Tungsten Mines Company, and ask you if you ever saw that before? (Hands to witness.) A. I did.

Q. Who is that signed by? A. R. Nenzel.

Q. You know Mr. Nenzel's signature, do you?

A. I think so.

Q. I call your attention to some pencil marks on the letter, and ask you if they were on when you received it, or were they put on afterwards.

A. They were put on afterwards.

Mr. THATCHER.—We offer it in evidence; it is addressed to the Consolidated Ores Company. I am going to ask another question.

Q. Mr. Taylor, who is the Consolidated Ores Company?

A. The Consolidated Ores Company is a Colorado corporation, of which I own 99.98 per cent of the stock; the business is buying and selling ores.

Q. Did this letter addressed to the Consolidated Ores Company, did that come to you? A. Yes.

Q. And you received it? A. I did.

Q. Did you also about the same time receive a telegram from Mr. Nenzel, which contains some, or a good deal of the information which is contained in that letter? A. I did.

(Testimony of David Taylor.)

Mr. WHEELER.—Objected to as calling for the contents of the instrument.

Mr. THATCHER.—I have not asked it. (Q.) Have you that telegram? A. I have not.

Q. Have you a copy of it?

A. No, I don't own one.

Mr. THATCHER.—I offer this letter in evidence, if the Court please.

Mr. WHEELER.—Our objection will go to all this line, that [20—16] Mr. Nenzel had signed something; I presume your Honor's ruling will go to all that?

The COURT.—I presume it contains statements after the Bancroft report?

Mr. WHEELER.—Not after the Bancroft report had come to the knowledge of the witness, but after Bancroft had visited the mine, the representation of its condition after he had visited it.

Mr. THATCHER.—This letter is after he had knowledge of the Bancroft report.

Mr. COOKE.—The other one was not.

Mr. THATCHER.—The other was after the Bancroft report had been made, the examination had been made, but before he received the report.

The COURT.—They both refer to conditions subsequent to the time Bancroft made his examination?

Mr. THATCHER.—Yes. (Q.) I call your attention also to the letters, in ink, "so" and over at the side "DPT"; who put those on there?

A. I did.

Q. They were not on there in the original letter?

(Testimony of David Taylor.)

A. They were not.

Mr. THATCHER.—We offer the letter in evidence with the exception of the pencil marks, and the change in that interlineation by the witness.

Mr. WHEELER.—I would like to add the special objection to this letter to all the other objections made, that it appears to be a letter not addressed to the witness, but to some other person, a corporation, and it was not exhibited to the witness by the defendants, or any or either of them.

The COURT.—I will overrule the objection, and the letter may go in for what it is worth as against Mr. Nenzel. [21—17]

(Letter dated February 24, 1919, is marked Plaintiff's Exhibit No 3.)

Mr. THATCHER.—(Q.) Mr. Taylor, calling your attention to Exhibit No. 3, it states "As per my letter of recent date, I hereby wish to give the information of the telegram I sent to Captain Taylor at New York yesterday," and then it quotes the telegram; did you receive such a telegram?

A. I did.

Q. Have you at the present time the telegram that you received? A. I have not.

Q. Have you a copy of it?

A. I have not to my knowledge.

Q. Do you know what has become of it?

A. No, it was checked up—

Q. (Intg.) Never mind. Do you know what has become of it? A. I do not.

Q. Have you made search for it? A. I have.

(Testimony of David Taylor.)

Q. Have you been able to find it in any of your files or papers? A. I have not.

Mr. THATCHER.—I would ask counsel if they have a copy of a telegram sent to Captain Taylor to New York, on February 23, 1919.

Mr. COOKE.—That telegram is set forth in this letter.

Mr. WHEELER.—It is a fact a telegram was sent, but it would not admit the telegram as evidence, and we object to the evidence on all the grounds urged. Such a telegram was sent; it appears evident that such a telegram was sent; Mr. Nenzel says he sent a telegram in the words and figures as follows; we admit the fact, but we renew our objections.

The COURT.—It will be admitted under the same ruling.

Mr. THATCHER.—Will counsel produce the original of the letter of March 7th, addressed to the Nevada Humboldt Tungsten Mines Company.

Mr. COOKE.—Have you a carbon copy there? [22—18]

Mr. THATCHER.—I have a carbon copy.

Mr. COOKE.—We have no objection to using a carbon copy, assuming it is a correct copy.

Mr. THATCHER.—I don't know that it is.

Mr. COOKE.—If it is a carbon copy it must be correct.

Mr. THATCHER.—(Q.) I call your attention to a carbon copy of a letter on the letter-head of the

(Testimony of David Taylor.)

Consolidated Ores Company; did you send that letter? A. I did.

Q. Is it a true and correct copy? A. It is.

Q. In the usual course of mail, addressed to the Nevada Humboldt Tungsten Mines Company at Lovelock? A. Yes.

Q. Was that in response to the letter of March 24th and telegram of March 23d, to which your attention has just been called, exhibit 3?

A. I should say it was.

Mr. THATCHER.—We offer it in evidence.

Mr. WHEELER.—We renew the objection on all the grounds urged, and call attention to the fact this is a letter addressed by the witness, David Taylor, to Nevada Humboldt Tungsten Mines Company, and while it might show the attitude of his mind to that company, there is nothing to suggest it ever became known to the defendants, or any or either of them, who signed the contract.

Mr. COOKE.—With reference to the development work in the mine as recently reported, it is not shown by whom reported, or whether he has reference to the previous reports from Mr. Nenzel, or from somebody else—Bancroft or somebody else.

Mr. THATCHER.—It is true that the letter does not so state, but Mr. Taylor has just testified that this letter was written in response to the telegram of the 23d and the letter of the 24th.

Mr. COOKE.—The witness put his construction on the letter; the letter will show for itself.

(Testimony of David Taylor.)

The COURT.—It seems to me you should connect that with some of the defendants before it is admissible.

Mr. THATCHER.—I ask to have it marked for identification, if the Court please.

(The letter dated March 7, 1919, is marked Plaintiff's Exhibit No. 4. for identification.)

Mr. THATCHER.—I would like to ask counsel to give me a letter of March 7, 1919, which was addressed to Mr. C. W. Poole, Nevada Humboldt Tungsten Mines Company, Mill City, by Mr. Taylor.

(The letter is handed to counsel for plaintiff by Mr. Cooke.)

Mr. THATCHER.—(Q.) I call your attention to a letter on the letter-head of the Consolidated Ores Company, addressed to Mr. Poole, and ask if you wrote that letter to Mr. Poole on the 7th of March? A. I did.

Mr. THATCHER.—We offer it in evidence, if the Court please.

Mr. WHEELER.—We renew the objections, and if they are overruled, the letter must be confined to the defendant Poole alone, it not appearing that anybody else knew anything about it.

The COURT.—It will be admitted as against Mr. Poole, subject to the objection.

(Letter of March 7th, 1919, is marked Plaintiff's Exhibit No. 5.)

The COURT.—I am assuming, Mr. Thatcher, that all these letters relate to conditions in the

(Testimony of David Taylor.)

mine subsequent to the Bancroft report.

Mr. THATCHER.—Yes, sir. (Q.) I call your attention to a letter on the stationery of the Nevada Humboldt Tungsten Mines Company, dated March 10, 1919, addressed to Captain David Taylor, and ask you if you receive that letter?

A. I did.

Q. Whose signature is to that letter?

A. R. Nenzel. [24—20]

Q. I call your attention to certain pencil marks on it; who put those on there? A. I did.

Q. And they were put on after you received the letter? A. They were.

Mr. THATCHER.—I offer it in evidence.

Mr. COOKE.—We object to it upon the ground it purports to be the statement of the defendant Nenzel only, and not binding upon any of the other defendants.

Mr. WHEELER.—And on each and all of the grounds heretofore urged.

The COURT.—It will be the same ruling.

(Letter dated March 10, 1919, is marked Plaintiff's Exhibit No. 6.)

Mr. THATCHER.—(Q.) I call your attention to a letter of date March 11, 1919, addressed to the Nevada Humboldt Tungsten Mines Company, on the letter-head of the Consolidated Ores Company. Have you the original of that letter, Mr. Cooke?

(Original letter handed to Mr. Thatcher.)

Mr. THATCHER.—(Q.) Did you send that letter, Mr. Taylor? A. I did.

(Testimony of David Taylor.)

Mr. THATCHER.—I offer it in evidence. This letter, if the Court please, is addressed to the Nevada Humboldt Tungsten Mines Company only.

Mr. WHEELER.—The objection is renewed, and particularly on the ground it does not appear to be addressed to any of the parties charged with the alleged misrepresentations.

Mr. COOKE.—We especially object to this letter, and we think the same objection is applicable to the others, that it is not responsive to the allegations of the complaint; that there is no statement in any of those that corresponds with these allegations [25—21] here as to the large amount of ore blocked out, developed and placed in sight and made ready for mining. I have not had time to look at this letter specially, with this particular point in view, but it does not seem to me that it contains any representations of any kind or character, and certainly no representations with reference to the amount or character of the ore blocked out, developed or ready to be mined, and we think in these allegations of fraud the proof should conform with reasonable certainty and closeness to the allegations.

The COURT.—The previous letters have been admitted on my understanding that they related to the conditions in the mine subsequent to the time when the Bancroft report was made; if they don't relate to the conditions in the mine, it seems to me they do not meet or answer the allegations in the complaint.

(Testimony of David Taylor.)

Mr. COOKE.—That is the point I am making, that they do not, none of them.

The COURT.—Let me ask you a question, General: Do you expect to introduce letters with reference to any other misrepresentation, or any other conditions except those in the mine?

Mr. THATCHER.—Why, I do, if the Court please. In other words, I will say frankly to your Honor, that I expect to show there was a series of misrepresentations with reference to the ores and conditions in the mine, all of which, of course, bear on the condition in the mine, either one way or another; for instance, there will be a representation that we are producing at the mill ore so rich that it clogs up the machinery; things of that kind, all coming from the mine, and all of which, coming together, making up the whole question of misrepresentation.

(Discussion.)

Mr. WHEELER.—The point is there is nothing whatever in that [26—22] letter that will have a similar bearing which caused your Honor to admit the preceding letter.

Mr. THATCHER.—I will connect it up, if the Court please; I will connect it up with Mr. Nenzel, at least, immediately.

The COURT.—Well, when it is connected, it may be admitted.

(Letter dated March 11, 1919, marked Plaintiff's Exhibit No. 7 for identification.)

Mr. THATCHER.—(Q.) I call your attention to

(Testimony of David Taylor.)

a telegram on Western Union, and ask you if you received that telegram over the wires?

A. I did.

Q. And when, about the date of the telegram, March 12th?

A. Yes, Lovelock, March 12th, I probably received it the next morning, a night letter.

Mr. THATCHER.—I offer it in evidence.

Mr. WHEELER.—It is objected to on the same grounds as the one last offered.

Mr. THATCHER.—The telegram is as follows:
(Reads)

“Lovelock, Nevada 12. Capt. David Taylor, 730 Rymes Bldg. Denver Colo. Your message and letters received stop Poole Friedman and Murrish out of town stop will get in touch with them tomorrow and wire you fully stop just returned from mine stop mine never looked so good stop are experiencing difficulty in roasting concentrates owing to sulphur fumes assay on concentrates twenty-three tons now at Mill City sixty-six per cent tungsten point thirty-seven sulphur R. Nenzel.”

The COURT.—The ruling will be the same.

(The telegram dated March 12th is marked Plaintiff's Exhibit No. 8.)

Mr. THATCHER.—(Q.) I call your attention to a letter, dated March 21st, on the letter-head of the Nevada Humboldt Tungsten Mines [27—23] Company, and ask you if you received that letter?

(Testimony of David Taylor.)

A. I did.

Q. Were those pencil marks on there when you received it?

A. They were not.

Mr. THATCHER.—We offer the letter in evidence, with the exception of the pencil marks.

Mr. COOKE.—The same objection as to this. It is simply the representation of one of the defendants, not shown to have been made with the authority of any of the others, and not binding upon them.

Mr. WHEELER.—And of course I suppose it is understood that as to all of this we have our objection that it is irrelevant and immaterial, and not tending to prove the precise allegations of the complaint; whether it is a misrepresentation or otherwise, or a matter of opinion, it does not tend, as I say, to prove any of those allegations.

The COURT.—It will be the same ruling.

(The letter dated March 21, 1919, is marked Plaintiff's Exhibit No. 9.)

Mr. THATCHER.—(Q.) I call your attention to a telegram, Western Union, dated at Lovelock, March 24th, and evidently received March 25th, and ask if you ever saw that before?

A. I did.

Q. By whom is that signed?

A. L. A. Friedman.

Q. Did you receive that telegram?

A. I did.

(Testimony of David Taylor.)

Mr. THATCHER.—We offer it in evidence.

Mr. WHEELER.—We object to it upon all the grounds heretofore urged, particularly that whatever Mr. Friedman may have wired will not bind any of the other defendants; there is nothing there that would even tend to prove any of the allegations of the bill; [28—24] the evidence is hearsay, *res inter alios actae* as to the defendant Loring, and as to each and all of the other defendants.

Mr. COOKE.—Also it does not purport to be anything more than an expression of hope on the part of Mr. Friedman; not a representation of any facts such as those alleged in the complaint.

The COURT.—That will be admitted, but as against Mr. Friedman only.

Mr. THATCHER.—I offer this for the purpose of binding Mr. Friedman, and to show that he had reviewed the previous correspondence. The telegram is as follows:

(Reads:)

“March 25, A. M. 4:30. Lovelock, Nevada.
Capt. David Taylor, 730 Symes Bldg. Denver,
Colo. Just returned from legislation and reviewed all your correspondence stop conclude from your correspondence that you feel unable to exercise your present option owing to depressed tungsten market condition and therefore we must anticipate your possible failure to exercise your option stop suggest that you and Bancroft come here some time this week

(Testimony of David Taylor.)

as all stockholders are here now and am sure you will find mine development fulfilling your most sanguine expectation and am confident that we could arrive at some modified arrangement as suggested in your correspondence but immediate action is necessary as am leaving for New York and Washington in week or ten days and would stop off at Denver but am traveling with several other parties wire answer. L. A. Friedman."

(The telegram is marked Plaintiff's Exhibit No. 10.)

Mr. THATCHER.—(Q.) Did you reply to that telegram, Mr. Taylor?

A. I did.

Mr. THATCHER.—Have you the telegram sent by Mr. Taylor to Mr. Friedman, March 25th?

Mr. COOKE.—Same general objection, so far as we are concerned [29—25] incompetent and immaterial, and don't tend to prove anything.

Mr. THATCHER.—(Q.) You sent this telegram to Mr. Friedman, did you?

A. Yes.

Mr. THATCHER.—You folks received it, did you?

Mr. COOKE.—Well, L. A. Friedman, President of the Nevada Humboldt Tungsten Mines Company, received it, I suppose. Of course we reserve our objection that these communications between Mr. Taylor and some one of these parties is not

(Testimony of David Taylor.)

notice to all of these parties, and not evidence against any party except the one that is shown to have received it.

Mr. WHEELER.—And in its nature don't tend to prove fraud or misrepresentation.

The COURT.—I cannot always realize when a letter is offered which has some relation to the matter in hand, what use counsel intend to make of it when they come to make the argument. I presume some letters of that sort will be admitted in this case, and ignored in the argument, if we get to the argument; but I think I will admit all of these letters if they have any relation to this particular business, representations and correspondence which induced the making of the contract, which is marked Exhibit "C" in the complaint, and if there is any desire on your part to weed them out of the argument, perhaps it can be done. If I take the time to weed out of each letter all the irrelevant matter, we will not get in more than fifteen or twenty letters during the course of the day.

Mr. THATCHER.—We offer the telegram.

The COURT.—Of course that telegram is only admitted as against Mr. Friedman.

Mr. WHEELER.—That I understood would be the rule.

(Telegram dated March 25th, 1919, marked Plaintiffs' Exhibit No. 11.) [30—26]

Mr. THATCHER.—(Q.) I show you, Mr. Taylor, the original of a letter sent by you to Mr. L. A.

(Testimony of David Taylor.)

Friedman, dated March 25, 1919; was that underscored by you at the time you sent it?

A. I don't remember; I don't absolutely remember, I should think it was.

Q. Your best recollection is that you underscored that before you sent it?

A. I could not say my best recollection, no; I don't know; I should say from the context of the letter I had.

Mr. THATCHER.—We offer that in evidence, if the Court please.

Same objection and same ruling.

(Letter dated March 25, 1919, is marked Plaintiff's Exhibit No. 12.)

Mr. WHEELER.—It is admitted only as against Mr. Friedman, as I understand?

The COURT.—Only as against Mr. Friedman.

Mr. THATCHER.—(Q.) I call your attention to a letter of March 27th, 1919, and ask you if you have seen that before?

A. I have.

Q. Did you receive this letter, Mr. Taylor?

A. I did.

Q. From Mr. Nenzel?

A. Yes.

Q. I call your attention to some pencil marks on it, were they there when you received this letter?

A. They were not.

Q. You put those on yourself?

A. I did.

(Testimony of David Taylor.)

Mr. THATCHER.—We offer the letter with the exception of the pencil marks.

Mr. COOKE.—The same objection that has been made to all of the other letters.

The COURT.—It will be the same ruling, admitted as against Mr. Nenzel.

(Letter dated March 27th is marked Plaintiff's Exhibit No. 13.)

Mr. THATCHER.—I offer in evidence a telegram of March 28th [31—27] to Mr. Taylor from Mr. Nenzel:

“Murrish Poole and I leave number twenty to-morrow morning arriving Denver Sunday noon.”

Mr. COOKE.—Objected to as incompetent, irrelevant and immaterial, not proving or tending to prove any issue in the case, simply stating that they intend to come to Denver.

(Discussion.)

The COURT.—I will admit it, but it will be admitted only as against Mr. Nenzel.

(Telegram dated March 28, 1919, marked Plaintiff's Exhibit No. 14.)

Mr. THATCHER.—(Q.) Mr. Taylor, did Mr. Nenzel, Mr. Murrish and Mr. Poole come on to Denver?

A. They did.

Q. You had previously received Mr. Bancroft's report of his first examination of the mine, had you?

(Testimony of David Taylor.)

A. I had.

Q. I call your attention to the report of Mr. Bancroft, and ask you if that is the original report which you received from him?

(Hands to witness.) A. It is with the exception of this supplemental report.

Q. Take the supplemental report out; did you have this report at the time Messrs. Murrish, Poole and Nenzel came to Denver?

A. I did.

Q. I call your attention to plate number 5 incorporated in that report, and ask you whether or not that plate number 5 is in the same condition now that it was when you received it from Mr. Bancroft? A. It is not.

Q. What difference is there in it?

A. There are a number of pencil lines and figures made upon it.

Q. Were they on there when you received it from Mr. Bancroft? A. They were not.

Q. They were not a part of the original first report of Mr. Bancroft [32—28] to you on this mine? A. They were not.

Q. When did they arrive in Denver, Mr. Taylor?

A. Sunday afternoon, I think it was March 30th.

Q. And did you see them that day?

A. I did.

Q. Kindly tell what took place that day—where did you see them?

A. They came to my office in the Symes Building.

(Testimony of David Taylor.)

Q. Tell what took place at that time, Mr. Taylor?

A. There was a general discussion first, I don't know whether first or not, but there was a general discussion that afternoon about the tungsten situation, the conditions of the market, the developments and conditions of the mine, the probabilities that I would not exercise my original option; I think various questions of the policy of the company, and so forth, were taken up.

Q. Did you discuss at that time the conditions of the mine? A. We did.

Q. Who was present at that meeting?

A. Messrs. Poole, Nenzel and Murrish.

Q. Were all three there all of that time?

A. They were that afternoon.

Q. Did you at that time show Mr. Poole, or any of them, Mr. Bancroft's report? A. I did.

Q. Tell what you did with reference to it at that time?

A. I asked Mr. Poole if he had ever seen Mr. Bancroft's full report; he stated that he had not, though he was familiar with some parts of it which I think Mr. Bancroft had given him previously; I asked him if he would like to read the report, and he said he would; I told him he could take it with him to his hotel that night, and bring it back to me the next day.

Q. Did you make any other request of him at that time?

A. I asked him to plot on that map information

(Testimony of David Taylor.)

which he had as to [33—29] recent developments at the mine, or developments since Bancroft's report had been made, at the mine.

Q. Is that about all that took place on the first day, or Sunday?

A. Yes, I should say it was.

Q. When did you see Mr. Poole, Mr. Nenzel and Mr. Murrish again?

A. They came down to my office Monday morning, the following day.

Q. Will you state what took place at that time?

A. They came into the office, I think Mr. Poole and Mr. Nenzel came in first, and we talked a little bit on general matters; I asked Mr. Poole if he had put on the original Bancroft report memoranda showing the additional tonnage of ore, with its values, that had been blocked out since his report; he stated that he had not had an opportunity to do that; he had with him some maps, mine maps or reports, records; I said, "Well, let us get the figures down now"; Mr. Poole gave me the lines, and figures were put on by me. Mr. Poole giving me the tonnages and assay values, widths of ore, and other memoranda that was put on at that time, with lines to represent the limits of the ore bodies, together with the figures which he claimed—figures of commercial ore which he claimed were shown by those lines.

Mr. THATCHER.—I offer this in evidence, if the Court please. I am probably a little previous

(Testimony of David Taylor.)

about it, but the rule of this Court is that you can't examine a witness about an instrument until it has been in evidence.

Mr. WHEELER.—I would like to ask the witness a few questions.

Q. You say the map, plate number 5, is not in the same condition it was when you received the report from Mr. Bancroft? A. I did.

Q. The additions thereon, pencil lines and figures, were placed there by whom?

A. By myself. [34—30]

Q. On what day were they placed there?

A. The day after Messrs. Poole, Murrish and Nenzel arrived in Denver, I think it was April 1st.

Q. They were placed there on Monday, and not on Sunday?

A. They were placed there the day after they arrived.

Q. In your office? A. In my office.

Q. And what were the circumstances under which you placed them there?

Mr. THATCHER.—I object, if the Court please, to cross-examination of my witness now.

Mr. WHEELER.—Then if I am not permitted to question the witness, I object to it as self-serving. I want to find out how he came to put them on there.

The COURT.—Proceed.

WITNESS.—What was the question, please?

Mr. WHEELER.—(Q.) I say under what cir-

(Testimony of David Taylor.)

cumstances did you place them there?

A. Mr. Poole stated to me certain area blocked out, and I asked him to put it down on this map, and show me where it was.

Q. You say what he stated to you, you placed here on the map? A. I did.

Q. What portion of the figures here were so placed by you and what portion by Mr. Bancroft, on the original report?

A. All the pencil lines, all the pencil memoranda were placed by me in Mr. Poole's presence, Mr. Poole reading me the figures to put down, and standing over my chair most of the time when I was putting them down, and telling me the figures.

Q. Did you observe from what memoranda or document he read the figures?

A. Some of the figures he read from the map, and some [35—31] of them may have been from memoranda that he had with him; he brought with him a large map that morning.

Q. What figures did he read from the map and what from the memoranda?

A. I could not tell you, sir.

Q. Do you know from what source he obtained the information contained in the map or in the memoranda? A. I do not know.

Q. That is the identical paper used at that time, you have not since made any transfer to that paper? A. None whatever.

(Testimony of David Taylor.)

Q. It was that paper made in the presence of Mr. Poole? A. It was.

Q. Where were you when this took place, in your office? A. In my office.

Q. At that time your office consisted of one or two rooms?

A. My private office consisted of one room.

Q. In which room was it, the private office or the other? A. Private office.

Q. Were you in the room where a drawing table was?

A. There was a drawing table, not in use, though.

Q. Did you place this on the drawing table when you did the work? A. No.

Q. Where was Mr. Murrish at the time you did this?

A. Whether Mr. Murrish was in there during that time, or came in during the process, I am not sure.

Q. Are you sure he was there any part of the time? A. Yes.

Q. What part?

A. I could not tell you exactly what part.

Q. A part of the time when the map was being drawn and the figures written down? A. Yes.

Q. Which part?

A. I could not tell you.

Q. Did Mr. Murrish participate in the transaction, say anything with regard to it, to give you any figures or lines to put down? A. No. [36—32]

(Testimony of David Taylor.)

Q. What did Mr. Nenzel do in that particular, was he there?

A. Mr. Nenzel was there I think all of the time.

Q. Did he participate in it, or give you any lines, or give you any figures?

A. He may have discussed with Mr. Poole some of the figures; he did not give me any of the lines.

Q. You say he may have done so, did he?

A. I say he may have done so.

Q. You don't mean to say that he did?

A. I don't know whether he did or not.

Q. Both Mr. Murrish and Mr. Nenzel were in the same room with you and Mr. Poole?

A. They were part of the time.

Q. Do you know whether they were participating in any way in the transaction, or even hearing the figures that were given, or had a notion as to what lines were being put on the map?

A. They could not help hearing the figures given, and seeing what was being done while they were in the room, it was a small room.

Q. They were not participating in the conversation, were they? A. I don't know.

Q. Was there any other person present at the time? A. Any other person than who?

Q. Than those mentioned, yourself, Mr. Nenzel, Mr. Poole and Mr. Murrish.

A. Mr. D. R. C. Brown and Mr. F. M. Taylor may possibly have been in the room off and on, they were not there throughout; I don't know that they

(Testimony of David Taylor.)

even came in the room, they had adjoining offices.

Mr. WHEELER.—We renew the objection as incompetent, irrelevant and immaterial, self-serving and hearsay, and in any aspect of your Honor's rulings heretofore, not receivable in evidence against any [37—33] person except Mr. Poole, with whom the alleged conversation took place, and who gave the alleged figures; it is not shown that Mr. Murrish or Mr. Nenzel knew anything about the figures, and hence it is not binding upon them, not purporting to be their representation, but merely a conversation as between Mr. Poole and the witness.

The COURT.—That plate will be admitted as against Mr. Poole and Mr. Nenzel. You say, however, that Mr. Murrish was not in the room all of the time?

WITNESS.—I think he was not there all the time; I think he came in there later.

Q. Mr. Nenzel was there all the time?

A. I think he was there; he may have been a few minutes later than Mr. Poole.

Q. Was he there all the time the figures were being placed on the plate?

A. I should say probably he was; Mr. Murrish was not; Mr. Poole gave me the figures.

The COURT.—Well, I think I will admit it as against all three of them. The testimony as to Mr. Murrish's knowledge of the matter is not very satisfactory, but it will be admitted, the plate only.

(Testimony of David Taylor.)

Mr. WHEELER.—The whole report is going in, I take it?

The COURT.—It will if you wish it; the plate is all that he has given testimony about.

Mr. THATCHER.—I appreciate that we will have to connect it up by Mr. Bancroft, showing this is the result of his examination; but he did receive this report, and that report and the statement is what he relied on. Do you want it all in, Mr. Wheeler?

Mr. WHEELER.—It should go in as the report that was discussed. [38—34]

The COURT.—The plate is what I am admitting, but the report goes in because counsel wishes it.

Mr. WHEELER.—Yes.

The COURT.—It is not shown that Mr. Poole examined the report, he simply had it.

Mr. THATCHER.—I am not sure about that. (Q.) Mr. Taylor, did Mr. Poole say that he had examined the report, or that he had not examined the report, or did he merely say that he had not put the lines on; did he say whether or not he read the report?

A. Yes; he said that he had not had opportunity to put the lines and figures on; he said that he had read the report, and we discussed it.

Q. The report was discussed at that time with Mr. Poole? A. Yes.

Mr. COOKE.—I take it, it is now going in simply as evidence identifying that instrument as the paper—

(Testimony of David Taylor.)

Mr. WHEELER.—(Intg.) That this was Bancroft's report.

The COURT.—The report that he received; there is no testimony as to its accuracy.

Mr. COOKE.—Simply a matter of identification as to what they were using.

The COURT.—There is no testimony as to the accuracy of the figures that were given, no testimony as to any matter of that sort, except the witness states that he put the lines and the figures down as they were given to him by Mr. Poole.

(The Bancroft Report and Plate No. 5, are marked Plaintiff's Exhibit No. 15.)

Mr. THATCHER.—(Q.) Now, Mr. Taylor, after that took place were there any further discussions or negotiations between yourself and Mr. Poole, Mr. Nenzel and Mr. Murrish? [39—35]

A. There were various negotiations covering two or three days, from that time up to the time the contract was signed, the contract of April 2d was signed, in which the terms and the form which the contract was to take were discussed and agreed upon.

(A short recess is taken at this time.)

Q. Were there any other discussions or statements with reference to the mine, Mr. Taylor?

Mr. COOKE.—We wish at this time, if your Honor please, to interpose an objection to any evidence with reference to the conversations or representations made at Denver, upon the ground that the evidence sought to be elicited is doubtless an attempt

(Testimony of David Taylor.)

to prove the allegations of false and fraudulent statements, so alleged in the complaint with reference to the physical conditions at the mine; and that proposition is injected into the case solely for the purpose of excusing the nonperformance of the contract by Taylor, it being affirmatively shown that the consideration for the contract was a performance by Taylor of the condition with reference to his obtaining this money; and it is shown affirmatively that he did not obtain the money that the contract, Exhibit "C," required him to obtain. But he alleges that because of this alleged fraud that occurred down in Denver, that the mine was only about half as valuable as it was represented to be, and therefore because of that alleged fraud he should have an abatement in the price; and upon that theory he offered performance before the expiration of the option of June, 1919, of such performance as he deemed would compensate him for this alleged fraud, the difference between the value of the property as it was represented to him, as he claims, and as it was actually found by him to be, through examination subsequently made by himself and by his man Bancroft.

(Argument.) [40—36]

The COURT.—I will overrule the objection.

Mr. COOKE.—We note an exception.

Mr. THATCHER.—(Q.) Were there any other discussions or statements made at that time with reference to the mine?

Mr. COOKE.—May I interrupt to ask that the

(Testimony of David Taylor.)

same objection, ruling and exception apply to all of this testimony as to the Denver Transaction.

WITNESS.—There was.

Mr. THATCHER.—(Q.) Mr. Taylor, at the time, or during the same day, after these notes were placed upon plate 5 of Mr. Bancroft's report, in the presence of Mr. Nenzel or Mr. Murrish did Mr. Poole make to you any further statement as to the mine and mine conditions? A. He did.

Q. State what was said by Mr. Poole?

A. He stated that there was over 60,000 tons of ore developed within the blocks indicated by those lines, by the pencil lines shown on the map, which would average over 1.75 per cent tungstic acid.

Q. When you say between the pencil lines do you mean the pencil lines and the other marks where pencil marks are made upon plate 5—60,000 tons—?

A. (Intg.) Sixty Thousand Tons altogether, including the original—

Q. Just a minute. Then as I understand it, Mr. Poole's statement was that these blocks which have the pencil memoranda on, and those which are within the pencil lines, had blocked out 60,000 tons, is that correct? A. Yes.

Q. And that is what Mr. Poole stated to you?

A. Yes.

Q. Who did you say was present at that time?

A. Mr. Nenzel and Mr. Murrish.

Mr. COOKE.—That is generally at the conversation, or at the [41—37] particular time this statement was made?

(Testimony of David Taylor.)

Mr. THATCHER.—At the particular time this statement was made?

A. Mr. Nenzel and Mr. Murrish, they all went out together, and these resumes were after the figures had been put down.

Q. Are you sure all those people were present?

A. Yes, sir.

Q. At that time?

A. At the end of this meeting?

Q. Yes. Now what else took place after that?

A. Either Mr. Nenzel or Mr. Murrish, I think Mr. Nenzel had also just been to the mine, and had just come back from it the day before they came to Denver; they also stated that the mine looked in very good condition, though they didn't go into the detail figures that Mr. Poole gave. After that meeting there were negotiations for a day or so, discussions of the form which the new contract should take, and what the terms of it should be, with the result that I think it was a Tuesday evening the terms were decided upon, and Mr. Nenzel and Mr. Poole and Mr. Murrish came to my office the next morning, and the contract dated April 2d was drawn up then, and signed.

Mr. COOKE.—Might I ask a question right there?

Q. Mr. Taylor, you stated a moment ago that Mr. Nenzel had just been in the mine before he arrived in Denver on this contract?

A. No, sir, I did not; I stated that either Mr.

(Testimony of David Taylor.)

Murrish or Mr. Nenzel, I wasn't sure which.

Q. I will accept the correction. Do you mean you knew they had been there of your own knowledge, or that was a part of the conversation?

A. No, I don't state that of my own knowledge; they stated it.

Mr. COOKE.—I didn't think that was clear in the record, so I called attention to it. [42—38]

Mr. THATCHER.—(Q.) Who prepared the contract, Mr. Taylor? A. Mr. Murrish.

Q. Is Mr. Murrish an attorney, do you know?

A. I think he is.

Q. Did you have any attorney to represent you?

A. I did not.

Q. I call your attention, Mr Taylor, to a paper, and ask you if this is the contract that was entered into at that time? (Hands to witness.)

A. It is.

Q. This is your signature to the contract, is it?

A. It is.

Q. And is that also Mr. Poole's signature?

Mr. WHEELER.—That is admitted in the pleadings.

Mr. WHEELER.—No question about it, is there?

Mr. COOKE.—Not so far as we are concerned.

Mr. THATCHER.—There are some other papers attached to this which are not in the pleadings; I am going to offer them all together; there are a number of powers of attorney.

Mr. COOKE.—No objections so far as we are

(Testimony of David Taylor.)

concerned, except the general objection heretofore made to all of this evidence.

Mr. THATCHER.—I offer it in evidence, together with the powers of attorney which are attached to it.

The COURT.—It will be admitted.

(The agreement and papers attached marked Plaintiff's Exhibit No. 16.)

Mr. THATCHER.—(Q.) How did you come to enter into this contract, Mr. Taylor?

Mr. WHEELER.—Objected to as calling for the state of mind of the witness.

Mr. COOKE.—A mere conclusion.

The COURT.—He has already stated the preliminary facts and negotiations, has he not? [43—39]

Mr. THATCHER.—(Q.) Would you have entered into this contract, Mr. Taylor, except for the written and other representations which were made to you, as you have heretofore testified?

Mr. COOKE.—Object to it.

Mr. WHEELER.—Leading and suggestive, and calling for the opinion of the witness.

Mr. THATCHER.—I will take your Honor's ruling on the question.

Mr. WHEELER.—And incompetent.

Mr. COOKE.—A mere self-serving statement whatever the answer would be.

The COURT.—I think I will allow the answer to the question.

(The reporter reads the question.)

(Testimony of David Taylor.)

A. I should not.

Mr. THATCHER.—(Q.) After this contract was executed by you and the other party, what did you do with reference to carrying out the terms of the contract?

A. I started in to try to borrow the money, raise the money necessary to pay off the indebtedness.

Q. State what you did?

A. I first talked to several people in Denver, to see if they cared to go in on the proposition, explaining to them—

Q. (Intg.) Never mind what you stated to them.

A. I talked to Mr. Harry James of the Denver National Bank, to Henry Swan, of Bright, Swan and Company, brokers; to Mr. Moore, of Dwight and Company, brokers, and to one or two individuals, particularly to Mr. David R. C. Brown and to Frank M. Taylor.

Q. Who is Frank M. Taylor?

A. My father. Mr. Brown and Mr. Taylor both said they would put up some money.

Mr. COOKE.—I object to that. [44—40]

Mr. THATCHER.—Never mind what they said.

(Q.) What else did you do?

A. About the middle of April I saw that I had to go East to raise the money. I wanted first to look over the mine myself, just to be able to say that I had seen the mine and mill and knew that it was an operating proposition; I telegraphed to either the company, or Mr. Poole, I think the Nevada Humboldt Company, asking them if they

(Testimony of David Taylor.)

would arrange to have Mr. Poole meet me at the railroad a certain day, and take me through the mine and mill; I then went out to Lovelocks to the mine, getting off at Imlay, somewhere about the 24th or 25th of the month of April, was met at Imlay by Mr. Poole, and taken up to the mine, where we spent the night; the next day Mr. Poole took me through the mine, stating that I had been through all the levels and seen all the workings, pointed out ore to me, the general developments in the mine, and took me after that over the surface outcrops, took me down various other workings, and through the mill; that afternoon we drove into Lovelocks.

Q. Mr. Taylor, what is your business?

A. Buying and selling ores.

Q. How long have you been engaged in the business of buying and selling ores?

A. Since 1902 in general ores, and since 1910 in the rare ores and rare metals.

Q. All that time you have been engaged in that business?

A. With the exception of a couple of years I was in the army.

Q. What has been the character of your professional education, if any, Mr. Taylor?

A. I have had no professional education.

Q. Are you a mining engineer? A. I am not.

Q. Did you ever study to be a mining engineer?

A. I did not.

Q. Ever work in a mine? A. I did not.

Q. Ever sample a mine?

(Testimony of David Taylor.)

A. I did not. [45—41]

Q. Ever have anything to do with the active operations or examination of any mine for the purpose of testing its value? A. I did not.

Q. While you were going through the mine did Mr. Poole make any statements to you as to the mine? A. Yes various statements.

Q. And the conditions in it?

A. There were various statements.

Mr. WHEELER.—The same objections heretofore urged, and I think the ruling of the Court will be this should be confined to Mr. Poole.

The COURT.—Well, it will be the same ruling as heretofore.

WITNESS.—There were different statements made by Mr. Poole and Mr. Morrin, who was with us, I think that is his name, the foreman of the mine, he went through with us.

Mr. WHEELER.—Mr. Morrin is not a party to the contract, your Honor.

Mr. THATCHER.—Well, I won't insist.

The COURT.—You are not asking for any statements made by the foreman?

Mr. THATCHER.—Any statements made by Mr. Morrin may go out.

Q. Did you take any samples for the purpose of having assays made at that time? A. I did not.

Q. Why didn't you do so?

Mr. WHEELER.—Objected to as calling for the opinion and conclusion of the witness, his secret

(Testimony of David Taylor.)

thoughts. What was said and done can be brought out.

The COURT.—Well, If he was induced not to take them by Mr. Poole, you can bring that out, but the fact that he didn't take any samples you have in. I will sustain the objection to the question. [46—42]

Mr. THATCHER.—(Q.) After that where did you go, Mr. Taylor, and what did you do?

A. I went to Lovelock that afternoon, drove down with Mr. Poole, and left that night for New York, left direct from Lovelock, went direct to New York, meeting Mr. Thane.

Q. When did you arrive in New York, if you recollect? A. I think it was April 30th.

Q. What was your purpose in going to New York?

A. My purpose in going to New York was to raise the necessary money to go through with this deal.

Q. What did you do when you got to New York?

A. On the way to New York I prepared with Mr. Thane's assistance, a prospectus, which was to be used to submit with Mr. Bancroft's report, to various people in New York and in the East who I thought might be interested. I talked to a good many people in New York, among them Mr. Dodd and Mr. Buckner, vice-president and president respectively of the New York Trust Company, and Mr. Edwin Holter, a general mining promoter, Chisholm and Chapman, brokers, and Mr. Carl Ilers and

(Testimony of David Taylor.)

Mr. W. S. Morse and Mr. Prosser of the American Smelting and Refining Company.

Q. You say you talked to them, endeavored to interest them?

A. Endeavored to interest them to put up part of the money, take part of the load.

Q. On the deal you put up, what were the terms of the deal with reference to preferred and capital stock?

Mr. COOKE.—To whom?

Mr. THATCHER.—To any one.

Mr. COOKE.—We object to any discussion of the terms between himself and other parties as incompetent, irrelevant and immaterial, not binding upon us, and hearsay; there is no way of contradicting it and no opportunity for cross-examination. [47—43]

Mr. THATCHER.—I submit it, if the Court please.

The COURT.—I will sustain the objection.

Mr. THATCHER.—(Q.) In endeavoring to make this loan, did you offer any inducements in addition to the security of the loan by preferred stock, or otherwise?

Mr. WHEELER.—Objected to as hearsay and irrelevant.

Mr. THATCHER.—This is as to what he did.

The COURT.—What is the purpose of it?

Mr. THATCHER.—Merely to show his efforts in endeavoring to put through the deal and finance the

(Testimony of David Taylor.)

loan, if the Court please, part of the work he did in endeavoring to get the compensation.

The COURT.—I will sustain the objection to that. You can't put that testimony in without giving conversations you have had with other people.

Mr. THATCHER.—(Q.) After that what did you do, what else did you do in New York with reference to the deal, Mr. Taylor?

A. I arranged with Mr. Jackson, who has been my attorney for some time, to go out to Lovelock the end of May or beginning of June, for the final reports, auditor's reports and preliminary examination as to titles, and the subsequent report which Mr. Thane insisted be made by Mr. Bancroft, to check up the conditions of the mine.

Mr. COOKE.—I move to strike out what Mr. Thane insisted upon as hearsay.

The COURT.—That may go out.

Mr. THATCHER.—No objection. (Q.) While you were in New York did you also make arrangements to have Mr. Bancroft make a further examination? A. I did.

Q. About what time did that take place, if you recollect?

A. About the middle of May, the 14th or 15th of May, I think.

Q. And after you had made that arrangement for Mr. Bancroft's second examination, what did you do? [48—44]

A. I stopped in York, Pennsylvania, to talk to one or two other people, and then went west, went

(Testimony of David Taylor.)

to Denver, expecting to meet Mr. Bancroft at Denver after he had completed the examination of the mine.

Q. And later did you come on west, further west?

A. I came west after I had arranged for the necessary funds to take up the indebtedness.

Mr. WHEELER.—I move to strike out “after I had arranged for the necessary funds,” as a conclusion of the witness; it is a vital issue in this case, and we would like to have an opportunity to go into it when the time comes, in proper fashion.

Mr. THATCHER.—I will admit it is not responsive to the question, and the answer may go out.

Q. While you were in Denver did you make any further or definite arrangements with reference to getting moneys for carrying out this contract?

A. I did

Mr. COOKE.—Object on the ground it presupposes, that some arrangement had already been made.

Mr. WHEELER.—It presupposes an arrangement. What was said or done might be brought out without having the conclusion of the witness whether it was an arrangement or contract, or anything of that sort.

The COURT.—The objection is sustained.

Mr. THATCHER.—(Q.) Well, did you make any arrangements—

A. I did.

(Testimony of David Taylor.)

A. Just a minute. Did you make any arrangements for the money necessary to carry out this contract?

Mr. WHEELER.—Objected to as leading and suggestive. I submit that the witness can be asked as to what he did. It need not embody the idea that it was an arrangement for money to carry [49—45] out this contract.

The COURT.—Well, the question is leading, but proceed. A. I did.

Mr. THATCHER.—(Q.) Tell what you did?

A. I arranged with Mr. F. M. Taylor for \$25,000, which was paid; I arranged with Mr. David R. C. Brown for \$10,000, which was held subject to my use whenever I wanted it and needed it. I arranged for—

Mr. COOKE.—(Intg.) We object, if your Honor please, to the witness testifying to his arrangements on the ground that is simply another guise of testifying as to what these people agreed with him, and hearsay as to us, and insufficient; a mere conclusion of this witness as to what constitutes an arrangement, and it is all matter which transpired out of our presence, and no opportunity for us to cross-examine these witnesses that he had these arrangements with.

Mr. WHEELER.—It embodies the idea or conclusion of the witness that it was done pursuant to the contract that was made.

The COURT.—He can tell what he did.

(Testimony of David Taylor.)

Mr. WHEELER.—Does the answer go out so far, your Honor?

The COURT.—He says that Mr. Taylor paid him \$25,000. I think that may stand. He says also that Mr. Brown's amount was \$10,000, which was subject to the witness' order. I think those facts may remain.

Mr. WHEELER.—It does not appear where, how, or under what circumstances the \$25,000 was to be paid.

The COURT.—He can't tell the whole thing at once. You may go on and ask for the facts.

Mr. THATCHER.—(Q.) Go ahead, Mr. Taylor, and tell what else [50—46] you did.

(By direction the reporter reads the last answer of the witness.)

The COURT.—You need not use the word "arrangement," just tell what you did.

A. I obtained the cash, and had it in bank.

Mr. THATCHER.—(Q.) Did you have Mr. Brown's ten thousand in bank?

A. Not for Mr. Brown's ten thousand, but I had cash for Mr. Taylor's twenty-five thousand, and I had sufficient cash in the bank, which, added to certain bonds which I had in my possession, furnished more than enough money to take care of the complete indebtedness of the company.

Mr. WHEELER.—I move to strike out the answer as being the opinion and conclusion of the witness, it not appearing what the indebtedness was.

The COURT.—The motion is granted.

(Testimony of David Taylor.)

Mr. THATCHER.—(Q.) How much money did you have under these arrangements which you have stated, in cash or immediately available to you?

A. Cash and immediately available, I had about a hundred and twenty-five thousand. I had in bonds, salable on the New York stock exchange, in my own possession, \$50,000 at least, more; I had already taken care of seventy to seventy-five thousand dollars of the indebtedness, so that the indebtedness of the mining company at that time was between one hundred and fifty to one hundred and seventy five thousand.

Mr. COOKE.—I move to strike out the testimony in regard to the bonds upon the ground that the arrangement for bonds is not a compliance with the contract, and that the contract contemplates money for the payment of these debts. The fact that the witness [51—47] might have property, whether bonds, real estate, horses or cattle, is not what the contract contemplates, and therefore any testimony as to his owning bonds, or to his owning any other kind of property which he thinks might be turned into money, is incompetent and immaterial, and not a performance of the contract.

Mr. THATCHER.—If the Court please, these questions are directed only to the situation as it existed in Denver at that time. As I go further with the examination I will proceed and show all of the facts.

Mr. WHEELER.—I have been waiting for the

(Testimony of David Taylor.)

conclusion of the answer to move to strike it all out on the ground it is incompetent, irrelevant and immaterial, and hearsay. The vice in the answers to the questions, and the form in which they have been placed, is not so much in what is said as the things to which they will lead us unless the evidence is brought in in the proper manner.

(Discussion.)

The COURT.—He states in the first place, I had \$125,000 in cash in bank; I can't throw that out as hearsay. He says he had bonds of \$50,000 more; I can't throw that out as hearsay. He says he had taken care of \$75,000 indebtedness; I don't think that can remain. You can't get this all out at once. Those two facts may remain, and the rest may go out.

Mr. THATCHER.—(Q.) Was this \$125,000 which you had in the bank available to you to be used for the purpose of carrying out this contract?

A. It was.

Q. Were the bonds which you had, \$50,000 worth of bonds, available to you for the purpose of carrying out this contract? A. They were.

Mr. COOKE.—Object to leading questions.
[52—48]

The COURT.—The questions are leading.

Mr. WHEELER.—“Were they available” calls for the opinion and conclusion of the witness.

The COURT.—That is a conclusion also.

Mr. THATCHER.—(Q.) For what purpose did

(Testimony of David Taylor.)

you have the \$50,000 in bonds?

MR. WHEELER.—Objected to as calling for the opinion and conclusion of the witness. I submit what was said and what was done by the people who advanced the money would be the only possible proper evidence.

THE COURT.—I think it will ultimately come to that, Mr. Thatcher, that the witness will be compelled to tell from whom he received the money, and on what terms.

MR. THATCHER.—I am going to do that, if your Honor please; but when I started to make that showing, they objected on the ground it was hearsay, not made in their presence, and they had no opportunity of cross-examining the party.

THE COURT.—They have insisted now that it be done that way. I think you may ask the question, and we will see what the result is.

MR. THATCHER.—(Q.) Mr. Taylor, tell what arrangements you made with F. M. Taylor and D. R. C. Brown, or any one else, with reference to money, in carrying out this contract?

THE COURT.—In answering that question state what occurred, and what Mr. Taylor said when he gave you that money.

WITNESS.—Mr. Taylor gave me \$25,000 to use according to my best judgment.

THE COURT.—What did he say?

A. He gave me \$25,000, and said, “if you decide to go ahead with this deal and take this stock, I will

(Testimony of David Taylor.)

take \$25,000 of it. Mr. [53—49] Brown told me the same thing, only he did not give me the money; he said "If you need the money, you may call on it."

Mr. COOKE.—I would like to have the benefit of an exception to the ruling, on the ground it is hearsay as to us; it makes no difference what these arrangements were, his duty under the contract was to get the money, and whether he had this, that, or other kind of arrangement is immaterial.

The COURT.—Well, you don't object to his testimony that he got the money, but you object to any testimony as to what it was for. I don't quite understand the position of counsel.

Mr. COOKE.—My position is simply this: that he can show in any way that he sees fit that he has actually done the things that he agreed to do, but the detail of how he got the money, or any orders in regard to these different people, or whether there were strings on it or not, I don't conceive that is important; his contract is to borrow a certain amount of money; and if he can show by legal evidence, which is by the parties who agreed to put up the money, that they made this arrangement with him and agreed to put this up, that is all right; or if he had this money in the bank, he can show that; but for him to go into details of these transactions with these people, it seems to me that is a matter of hearsay.

Mr. WHEELER.—Your Honor, my position will

(Testimony of David Taylor.)

be made clear by my present motion. I now move to strike out the answers of the witness as to what was done and what was said, upon the ground that they are incompetent as failing to prove anything done under the contract. In other words, the way to get at a thing of this kind, where a man comes and says I have performed, as I understand the rule is this: In substance, you say what was said and done by you in your efforts to perform this contract? Thereupon the [54—50] witness says so and so. Now if the thing that he testifies to is not an act in performance of the contract, then opposing counsel can do as I do now, move to strike it out. This witness has said my father advanced to me \$25,000 in cash, and said if you conclude to go into this arrangement you may use this money, or words to that effect. Now that was not an unconditional subscription to this matter, but it was dependent entirely upon this witness' conclusion. Perhaps if the father had said, here is \$25,000, if you get subscriptions amounting to the whole amount I then will go in, it might remain in the record as evidence, but no, he does not say that; he says, if you go through the mental processes that make you conclude finally to go into this transaction, then you may count me in; that would not be an act in partial performance of the contract.

The COURT.—The motion is overruled.

Mr. WHEELER.—Under the former understanding, I take it we have an exception to the former ruling as well as to this one.

(Testimony of David Taylor.)

Mr. THATCHER.—(Q.) That was in Denver?

A. Yes.

Q. What did you do after that with this property?

A. I telegraphed to Mr. Jackson to start west from New York; just after he had started, after I had received word that he had left, I got the first assays on Mr. Bancroft's subsequent examination, which had just been made, Mr. Bancroft getting to Denver about that time.

Mr. COOKE.—Was that date fixed?

Mr. THATCHER.—(Q.) Did you fix that date; was that by telegram?

A. No, it was either by mail or over the telephone, by Mr. Watts in Boulder, later confirmed by certificates. That was I think, May 27th.

(At 4:30 P. M. an adjournment is taken until Wednesday, September 15th, at 10 o'clock A. M.)
[55—51]

Wednesday, September 15th, 1920,

Court convened, 10 o'clock A. M.

Direct Examination of Mr. DAVID TAYLOR,
Resumed.

Mr. THATCHER.—(Q.) Mr. Taylor, yesterday you testified that you received word that Mr. Jackson was on his way, and that after that you received the results of the assays of Mr. Bancroft's report over the phone or by letter; now after that what did you do? A. I discussed with Mr. Bancroft—

Q. No what did you do, not what you said.

(Testimony of David Taylor.)

A. Within a couple of days after that I started for Nevada.

Q. Where did you go?

A. I went to Lovelock, met Mr. Jackson, told Mr. Jackson that the—

Q. Never mind what you told Mr. Jackson.

A. After meeting Mr. Jackson I met Mr. Poole— Mr. Jackson and I met Mr. Poole on the street, and asked him if he wished to verify Mr. Bancroft's report on the mine; he said he would like to.

Q. Did you tell him what Mr. Bancroft's report was?

A. I did. He said it was impossible, that Mr. Bancroft must have been mistaken; we suggested that he had better check it up himself, and suggested that we go up to the mine that afternoon.

Q. Did you go to the mine that afternoon?

A. We went over to the office first, and they arranged to have a car meet us on the arrival of the noon train at Mill City.

Q. What office?

A. The office of the Nevada Humboldt Mines Company; Mr. Nenzel made the arrangements by telephone, Mr. Jackson, Mr. Poole and I went up to the mine that afternoon, drove up to the mine; we had various talks with Mr.—discussed conditions with Mr. Poole; on the way up Mr. Poole made the statement that if Mr. Bancroft was right—

[56—52]

Mr. WHEELER.—Just a minute. We ask that

(Testimony of David Taylor.)

any statements of Mr. Poole's be confined to Mr. Poole alone.

The COURT.—It is so ordered.

Mr. COOKE.—And the same as to the other.

Mr. THATCHER.—Go on.

WITNESS.—Am I to say what Mr. Poole said?

Q. Yes, go ahead.

A. Mr. Poole said that if Mr. Bancroft's report was right, that the foreman at the mine had lied to him, giving him wrong information; he then said, "When we get up there I wish you would take Mr. Jackson, take him away from the office, as I want to spend two hours with the foreman, and if I find that he has given me wrong information, I will knock his block off," or something of the kind.

Q. What else?

A. Mr. Jackson and I spent the afternoon, two hours of it, around the mill; I had been through before; about 5 o'clock we got back and had supper, and Mr. Poole went down the mine, taking Mr. Jackson and the foreman, Mr. Morrin.

Q. What date was that, Mr. Taylor, as near as you can remember?

A. May 29th, I think; May 29th or 30th.

Q. Have you a diary? A. Yes.

Q. Will that refresh your memory as to the dates? A. Yes.

A. (After examining diary) Saturday, May 31st.

Q. Mr. Morrin, Mr. Jackson and Mr. Poole went down the mine? A. They did.

(Testimony of David Taylor.)

Q. When did you next see them again?

A. I saw them again about two hours later, when they came out of the mine; they came up and went through the office—

Q. Wait a minute. When they came up out of the mine was there any conversation at that time?

A. There was.

Q. Who was present? [57—53]

A. Mr. Jackson, Mr. Poole and myself.

Q. What was said?

A. As soon as they came into the office I asked Mr. Poole if Mr. Bancroft was right; he replied "Bancroft is right, the foreman lied to me." We drove back then to Imlay, I think either Mill City, or Imlay, caught the Pacific Limited back to Lovelock, having previously telegraphed, or asked Mr. Goodin, one of the defendants, to meet us in Lovelock on the arrival of that train, and before leaving for San Francisco on the Overland. Mr. Goodin met us at the hotel, went up to our room; we told him what Mr. Bancroft's report as to the tonnage was, that instead of 60,000 tons or over, there was less than 20,000 tons blocked out, told him Mr. Poole had been down in the mine that afternoon.

Mr. COOKE.—We object to any conversation with Mr. Goodin, unless in the presence of the defendants.

Mr. THATCHER.—Mr. Goodin is a defendant, if the Court please.

(Testimony of David Taylor.)

Mr. WHEELER.—It can only bind Mr. Goodin.

The COURT.—It will be admitted as against Mr. Goodin.

WITNESS.—Mr. Goodin met us in the hotel, went up to our room, either Mr. Jackson's or mine, in the hotel; we told him instead of 60,000 tons developed, or over, there was less than 18,000 developed, that is, ore averaging 1.76 or 1.75 per cent WO₃. Mr. Goodin was very much surprised.

Mr. COOKE.—We object to that.

Mr. THATCHER.—Never mind whether Mr. Goodin was surprised.

A. Shall I state what Mr. Goodin said?

Q. No. Did you tell Mr. Goodin at that time anything about Mr. Poole having been up to the mine? A. I did.

Q. What did you tell him?

A. I told him exactly what had happened; Mr. Poole had gone to the mine, gone down into it, come back and said that Bancroft's report was right.

Q. From Lovelock where did you go? [58—54]

A. From Lovelock went to San Francisco; left Lovelock at 3 o'clock on the Overland Limited, that would be Sunday morning.

Q. Did you see any of the defendants in San Francisco?

A. Met them all during the next week.

Q. Did you meet all of them?

A. No, I don't mean all of them—let's see; Mr. Murrish, Mr. Jones, Mr. Poole and Mr. Nenzel.

(Testimony of David Taylor.)

Q. Where did you meet them in San Francisco?

A. Met them at various times during the next week, Palace Hotel, mostly; at Mr. Thane's and Mr. Bayless' office.

Q. Can you repeat the subject of the conversation during that time?

Mr. WHEELER.—It should be confined to the persons present.

The COURT.—Name the persons present.

Mr. THATCHER.—(Q.) Can you give the actual words used at those conversations?

A. Not the actual words, no.

Q. Can you give the substance? A. I can.

Q. Tell as near as you can the substance of what took place after you met the defendants, or any of them, in San Francisco, and tell who was present at each meeting, if you can.

A. We arrived in San Francisco Sunday afternoon; the next morning went to Mr. Bayless' office; we told Mr. Bayless that we were not going through with the contract on account of—

Mr. COOKE.—Just a moment. You say you told Mr. Bayless? A. I did.

Mr. COOKE.—Object to that as hearsay.

Mr. THATCHER.—I think that may be stricken out as hearsay.

Q. Tell what was said by you in the presence of the defendants, or what the defendants said; tell all the conversations that took place in the presence of the defendants.

(Testimony of David Taylor.)

A. Well, Monday morning Mr. Murrish, Mr. Jones, Mr. Nenzel and [59—55] Mr. Poole came to Mr. Bayless' office, where I was with Mr. Bayless and Mr. Jackson; Mr. Jackson did the talking for me as my attorney. Mr. Jackson stated to them,—gave them a general resume of the results of the examination, and asked them in the beginning to correct him if he made any misstatements; he then proceeded and said this mine was represented to contain 60,000 tons of commercial ore; the report showed that it contained less than 20,000 tons; “my client raised money to make these loans, representing that it was—the mine had the 60,000 tons blocked out; he could not very well put his money or his friends, money into a mine that has 20,000 tons blocked out, when it was obtained to go through with one that had 60,000; we are willing, however, to rearrange the loan on a sum basis, by which my client is protected, and suggest the following proposition, to put up about”—

Mr. WHEELER.—That is objected to as incompetent, irrelevant and immaterial; it is of no consequence what proposition may have been made; that whatever may be the rights of the parties, depended upon what took place prior to this time, and any suggestion the witness might have made as to what he was willing to do on a different basis cannot be binding upon the defendants, or any or either of them.

(Testimony of David Taylor.)

Mr. THATCHER.—Does counsel object merely to the word “willing?”

Mr. WHEELER.—No, my objection goes to any evidence of any proposition of any kind that you made, that was in any manner different from the contract.

Mr. THATCHER.—Well, our statement on that is this, if the Court please, and our theory of the case is this; that where two men enter into a contract for the performance of certain things, and one of them falsely, fraudulently, or without fraud—I mean [60—56] without willful fraud, misrepresents the facts, that the other party may demand the performance of the contract, with compensation for deficiency in either the quality, quantity, or the thing to be sold, or that which is the subject of the contract; and we are going to show at this time with reference to this matter that Mr. Taylor then offered to advance \$85,000, 10,000 to be used for developing the mine, and \$75,000 to be used by the corporation for the payment of its credit.

The COURT.—This objection to the introduction of testimony rests practically on the same grounds as the one that was made yesterday, as to misrepresentations, and I think I will let the whole matter go in, and pass on it later.

Mr. WHEELER.—Your Honor, it does not rest in my mind on the same ground, and perhaps you will let me state the difference.

(Argument.)

(Testimony of David Taylor.)

The COURT.—I understand your point, and I think I shall allow the testimony in. It is allowed simply as showing what he offered to do, and of course the Chancellor will determine later whether he was at all times ready to do equity or not. I think that is one of the issues in the case; he has alleged that he was at all times ready to do equity, and that has been denied. The remainder of the testimony, as to what the defendants said or did, or whether they accepted or rejected this proposition, will be passed on later. I have serious doubts about that.

Mr. THATCHER.—(Q.) Was the offer which you made at that time or which was made on your behalf by Mr. Jackson, afterwards incorporated into a writing? A. It was.

Q. I call your attention to a paper, and ask you if that is the writing? (Hands to witness.)

A. It is. I should like to correct my last answer.
[61—57]

Q. Just a minute. Who prepared this?

A. Mr. Jackson.

Q. And was it prepared after the conferences and conversations which you have related?

A. It was.

Q. Was there any modification made of this? Take a look at that, and find out whether or not any modification, change, or addition was made to that afterward, if you know?

Mr. WHEELER.—Yes, there was an addition made

(Testimony of David Taylor.)

to that agreement, as I understand it, that it should not be made effective, the offer of the tentative agreement, unless ninety per cent of the creditors should consent thereto.

WITNESS.—I should say that is substantially it.

Mr. THATCHER.—There were some changes besides this?

A. There may have been some legal questions, or legal protections, which Mr. Jackson thought necessary to put in, I don't remember; those were the essential terms of the agreement we offered.

Mr. THATCHER.—We offer this in evidence.

Mr. WHEELER.—Objected to as incomplete, it appearing that before it was finally presented an addition or addenda was made to it.

Mr. THATCHER.—The objection is good. I will ask that it be marked for identification.

(The agreement is marked Plaintiff's Exhibit No. 17 for identification.)

Mr. THATCHER.—(Q.) Mr. Taylor, after this instrument which you have identified, was prepared, what was done with it, if you know?

A. It was submitted to Mr. Murrish, Mr. Poole and Mr. Nenzel.

Q. Do you recollect when it was submitted?

A. It was submitted a Friday afternoon, and Friday evening it was put in their mail box at the Palace Hotel, by agreement; it was put in Mr. Poole's box, I forget whether Mr. Nenzel and Mr. [62—58] Murrish, there were two copies put in two of their three boxes at the Palace Hotel.

(Testimony of David Taylor.)

Q. Do you know whether they ever saw it or not? A. They did.

Mr. WHEELER.—I think the order of the proof should be followed, the instrument proved and the Court pass upon it, before we question further what was done with it. It becomes utterly immaterial unless the document is admitted in evidence.

Mr. THATCHER.—I cannot prove it all at once. I don't want to withdraw this witness and put on another one to show what the differences were; I will follow it up.

Mr WHEELER.—Has counsel the addenda? If counsel has not perhaps I can assist him.

Mr. THATCHER.—I have some addenda here, and Mr. Jackson is looking them up.

The COURT.—A copy was introduced before, was it not?

Mr. THATCHER.—Introduced in that form, in an affidavit made by Mr. Murrish, and my recollection is that it did not at that time contain the addenda; and I am going to show by another witness that is the condition it was in when it was presented by Mr. Taylor to them, without the addenda.

Q. That agreement as it stands, however, was the one which you deposited in Mr. Murrish's, or some of the defendant's boxes at the Hotel. A. Yes.

Q. Without any addendum at all?

A. So far as I know, without any addendums; that covers the essential points.

(Testimony of David Taylor.)

Q. When did you next see any of the defendants, and who?

A. Seven-thirty that evening at Mr. Bayless' office.

Q. Who was there?

A. Mr. Nenzel, Mr. Jackson and myself; Mr. Poole and Mr. Nenzel came over to Mr. Bayless' office.

Q. In Mr. Bayless' office who was present?
[63—59]

A. Mr. Poole, Mr. Nenzel, myself, Mr. Jackson and Mr. Bayless.

Q. Was Mr. Murrish there?

A. Mr. Murrish was not there.

Q. What was said at that time with reference to this contract?

Mr. WHEELER.—I renew the objection, this is confined to those present; that is the ruling, I take it, your Honor?

The COURT.—Yes, that will be the rule. Is that the only objection?

Mr. WHEELER.—Our objection heretofore urged to all of this, of course. I don't want to have to repeat the request that the matter be confined, right along. It is confined to those who are present, unless the Court shall otherwise rule at the moment.

The COURT.—That will be understood, unless something further occurs.

Mr. THATCHER.—(Q.) What was said at that time?

Mr. COOKE.—You asked about a contract.

(Testimony of David Taylor.)

What transaction do you refer to? If it refers to this proposed document, we object to it.

Mr. THATCHER.—This proposed document.

Mr. COOKE.—We object to it as assuming that it constitutes a contract.

Mr. THATCHER.—Your objection is good.

(Q.) After this meeting, after you had left a copy of this paper with the defendants, did you have a meeting with any of the defendants, and where, and who was present?

A. I did. With Mr. Nenzel and Mr. Poole in Mr. Bayless' office across the street from the Palace Hotel, seven-thirty Friday evening, at which interview Mr. Jackson, Mr. Bayless, Mr. Poole and Mr. Nenzel and myself were present.

Q. State what took place at that meeting and the conversations, if you can.

A. Mr. Poole and Mr. Nenzel—I have forgotten which one of them did the talking for the otherside—said “Your [64—60] proposition is satisfactory; Mr. Murrish does not care to make any changes in it; it will be submitted to the creditors tomorrow morning for their approval; we will ask them to accept it; we are convinced that is the best proposition that can be done, that we can get, and under the circumstances it is perfectly fair; we thank you for making it.

The COURT.—(Q.) Did you say Mr. Murrish was present at that meeting?

A. Mr. Murrish was not present, to the best of my knowledge.

(Testimony of David Taylor.)

Mr. THATCHER.—(Q.) Now, Mr. Taylor, at that time will you state, and give the facts, as to whether or not you were ready, able and willing to perform the conditions which are outlined in that paper?

Mr. WHEELER.—Objected as calling for the opinion and conclusion of the witness.

The COURT.—I will allow the question.

Mr. WHEELER.—Let me add the general objection that it is incompetent, irrelevant and immaterial.

WITNESS.—Will you give the question again?
(The reporter reads the question.)

A. I was.

Mr. THATCHER.—State the facts.

Mr. COOKE.—I object to that; the witness is interrogated with reference to conditions of some paper that is not before the Court.

The COURT.—I think the objection is good.

Mr. THATCHER.—We offer the paper in evidence.

Mr. COOKE.—We object to it for the reason that it affirmatively appears that there was some other paper, termed an addendum or addenda, and made a part of it, and the two should go together, or in the absence of the one satisfactorily explained.
[65—61]

Mr. WHEELER.—With reference to Exhibit 17 for identification, for the purpose of the record.

Mr. THATCHER.—I think, if the Court please, the witness has testified that this is the paper,

(Testimony of David Taylor.)

and if there were addenda, he had no recollection as to what they were; but this is the paper that was left with the defendants in his testimony.

Mr. WHEELER.—It does not appear that this is the final form of the paper on that night; it appears there had been certain addenda to it prior to this conference.

The COURT.—Can you prove the exact document presented?

Mr. THATCHER.—He has testified that was the exact document presented.

The COURT.—I didn't understand it exactly that way; if he testifies positively, that is another matter.

Mr. THATCHER.—(Q.) Do you know whether that is the exact document which you presented?

A. There may possibly have been some addenda I didn't see; I don't believe there were because I think I should have been consulted and know it; the document that was presented then was type-written just before it was taken over to the Palace Hotel; and I think if there had been any changes or any addenda of any kind I should have known it; but to the best of my knowledge and belief, that was the document that was presented, or a copy.

The COURT.—(Q.) Was it a copy of this document that was sent? A. I think it was, sir.

Q. Did you ever see the copy that was sent?

A. I saw the papers that were sent at the time.

Q. Did you read it? A. Yes.

Q. And do you know it was a copy of this?

(Testimony of David Taylor.)

A. I think it was, sir. [66—62]

Q. You think so, do you know?

Mr. THATCHER.—Look at it, read it, and tell us do you know whether that was a copy? (Hands paper to witness.)

A. That is, sir.

The COURT.—(Q.) Well, was that the document that was presented to Mr. Nenzel and Mr. Poole at that meeting—was this the document?

A. It was taken over to the hotel, put in their box at the hotel.

Q. There was no document of this character present at this meeting at which you say Mr. Nenzel, Mr. Poole and Mr. Jackson were present?

A. I think this copy probably was in our possession; they had seen the original, and come back and said they would accept it; whether he referred exactly to this copy or not I could not tell you; they said the terms of the original were satisfactory, and “we will accept it.”

Q. Is this a copy of that original?

A. It is, sir.

Q. An absolute copy of the original. You have no doubt about that? A. No, sir.

Q. The only document about which there can be any question is the copy transmitted to the Palace Hotel?

A. I say the original of this was transmitted to them at the Palace Hotel.

The COURT.—It will be admitted.

(Testimony of David Taylor.)

Mr. WHEELER.—May I cross-examine, your Honor?

The COURT.—Certainly.

Mr. WHEELER.—(Q.) I call your attention to Exhibit 17 for identification, and the fact that it is recited that the parties of the third part, and such creditors of the company as shall become parties hereto, you recall that it was anticipated that creditors would become parties to the contract, do you not? [67—63]

A. It seems to me creditors had to approve the contract.

Q. And do you not also recall that your counsel, Mr. Jackson, made an addition to that contract in these words: “This agreement shall not be effective unless and until creditors owning at least 95 per cent in amount of the claims set forth in schedule “A” in excess of \$500 shall become parties hereto?” A. I do not.

Q. You remember nothing being said upon that subject?

A. I remember several various discussions throughout the week upon it; I don’t remember whether that was put in by my counsel or not.

Q. Do you not remember it was understood that as a part of your offer there should be that provision?

A. No, sir, I can’t say that I do, because on that matter I would rely altogether on my counsel for deciding such matters.

Q. Was not your counsel’s advice at that time,

(Testimony of David Taylor.)

expressed in the presence of these other gentlemen as well as yourself, that there should be a provision to that effect?

A. I just told you that I didn't notice it.

Q. Did you not understand that your offer as actually made by you embraced that proposition, that 95 per cent of the creditors should agree on the terms that I have just read?

A. No, sir, I didn't notice it.

Q. What say?

A. No, sir, I don't know exactly; that is a matter I left entirely to my counsel's judgment.

Q. You know what your offer was, don't you?

A. I know what my offer was in general terms, to be put in proper legal shape to protect me, which I left to my counsel.

Q. Was that Exhibit 17 for identification, which you hold, or was that Exhibit 17 for identification, with the addendum to it, that 95 per cent of the creditors must agree?

A. I could not tell you that, sir; that is a copy of the proposition [68—64] that was taken over to them.

Q. So the fact is you really don't know whether that is the offer you actually made or not, do you?

A. That is not the fact.

Q. What is your answer?

A. That is not the fact.

Q. You then do know that was the offer as actually made, without any change or addendum, do you?

(Testimony of David Taylor.)

A. I told you that this is a copy of the offer that was taken over to the Palace Hotel.

Q. We quite understand that was a copy of the offer that was taken over to the Palace Hotel, but is that the offer that was actually made by you, or was that the offer that was actually made by you changed, with the condition that 95 per cent of the creditors must agree?

A. I could not tell you about that, sir.

Q. So you don't know really what offer you actually made?

A. I do know what offer I actually made.

Mr. WHEELER.—I submit, your Honor, the document is not sufficiently identified as being an offer actually made.

The COURT.—Well, as I understood his oral testimony with reference to that, when he made the proposition Mr. Poole said they were satisfied for themselves, but it must be submitted to the creditors, so I think I will allow this to go in; it goes so far, simply as his offer, but of course with that provision, that it would have to be submitted to the creditors for their approval.

Mr. WHEELER.—My point is that this is not the offer that the parties were referring to when they said it was satisfactory, but it was another and a different offer; and the offer that they said was satisfactory required the assessment of 95 per cent of the creditors, and that this witness has not identified this as the offer that was thus referred to when they said it was satisfactory. [69—65]

(Testimony of David Taylor.)

The COURT.—I think I will admit this subject to the objection. (The agreement marked Plaintiff's Exhibit 17 for identification is admitted and marked Plaintiff's Exhibit 17.)

Mr. WHEELER.—At this point we request opposing counsel to produce the addendum, or modification or addition to the document. Exhibit 17 for identification, prepared by Mr. Jackson, and made as a part of said offer. We would like it for inspection, if counsel will kindly give it to us.

Mr. THATCHER.—Well, we will hunt it up. I will show that by another witness.

Mr. WHEELER.—May I be permitted to ask the witness one further question, as to whether or not he saw this or knew anything of it.

Q. I show you a document just handed to me by your counsel upon the request to produce, beginning with the words: "This agreement made in several counterparts which together shall constitute one original. This agreement shall not be effective unless and until creditors owning at least 95 per cent of the claims set forth in schedule "A" in excess of \$500 shall be parties hereto," and containing several other paragraphs. Did you ever see that document before?

A. I could not tell you whether I have or not, sir; I have seen a good many documents, a good many drafts.

Q. Examine it and state whether it was not in truth a part of the offer which you say you made at that time to these parties at San Francisco.

(Testimony of David Taylor.)

A. I just told you I could not tell you.

Q. Will you please examine it and see if it will not recall to your mind what it was. (Witness examines document.)

A. I cannot make a positive statement; I can tell you what my impression is. [70—66]

Q. Give us your best belief.

A. My best belief is that these were notes and memorandum made by Mr. Jackson, probably during the evening or the next morning during the creditors' meeting, as little changes that would be finally made to the proposition; because Mr. Jackson stated it was so agreed by the defendants, and it was agreed that Mr. Jackson should give this proposition; this proposal was to be a draft subject to discussion as to details, and rearranged as to details to suit the creditors the next morning.

Q. You do recognize those matters as being statements your counsel required at that time?

A. I don't positively recognize them, no.

Q. Do you recall any of them, whether recognized by you to be a part of your offer?

A. I cannot recall whether the detailed wording of those were or not.

Q. Not the detail, but whether the substance was there or not?

A. I could not tell you that without taking a great deal of time, whether those paragraphs were covered in the original agreement.

Q. Please take the necessary time and tell us whether or not it was not your understanding that

(Testimony of David Taylor.)

the substance of the matters therein contained was a part of the offer made by you?

A. Whether it was a part of the offer made at that time or not, I do not know.

Q. I am not talking at that time; I am talking of the offer made by you?

A. The offer made by me at that time—the offer made at that time was subject to modification and agreement to suit the developments of the case, so as to be satisfactory to the creditors and to the other side and our side.

Q. Was not the document I have just shown to you, or its substance [71—67] or effect, all the matters therein set forth, understood by you to be a part and parcel of the offer made by you?

A. I told you I did not know whether it was at that time or not, eventually it would have been; I should say those are important points, whether they were covered originally, or whether points to be brought up for discussion when the final contract was drafted or not, I could not tell you.

Q. So the real fact is you cannot tell us whether or not those items were embraced in the offer made by you, which you say these gentlemen told you Mr. Murrish said he found no objection to?

A. What was the last part of the question? You say Mr. Murrish told me they would have no objection?

Q. No. These gentlemen told you Mr. Murrish said he found no objection to?

(Testimony of David Taylor.)

A. I would like to have the whole question.

(The reporter reads the question.)

A. I could not tell you whether they are in that contract, that draft of contract submitted to them before dinner or not, taken over to the hotel.

Mr. WHEELER.—I submit, your Honor, that the document is not sufficiently identified.

The COURT.—I think I shall admit it for what it is worth. It appears to me from the testimony of the witness, and what I gather from the conversation of counsel and the objection, that it contains the substantial offer that was made, but if anything was omitted it was some provisions with reference to future acceptance and approval, which must be had before the document could be considered as a contract.

(A short recess is taken at this time.)

Mr. THATCHER.—(Q.) Mr. Taylor, you testified that Mr. D. R. C. Brown and Mr. Frank M. Taylor discussed this deal with you; will [72—68] you state what took place in your conversation or discussions with Mr. F. M. Taylor?

A. I had a great many discussions with him.

Mr. WHEELER.—The objection heretofore made goes to this line, your Honor.

The COURT.—You will be permitted to answer to the extent of showing the terms on which the money, the \$25,000 was given.

Mr. THATCHER.—I know the question is rather indefinite, but I don't want to make it leading, and that is the only way I can ask it.

(Testimony of David Taylor.)

A. I had a number of discussions with Mr. F. M. Taylor at various times after the second of April, up till I came to San Francisco the first of June.

The COURT.—That was what you wanted to ask him, the terms on which the \$25,000 was given to Mr. Taylor?

Mr. THATCHER.—Yes, sir.

WITNESS.—The statement was always made by me that there was over 60,000 tons of ore blocked out averaging 1.75 per cent W03.

Mr. WHEELER.—I move to strike out the answer of that being one of the terms of the offer.

The COURT.—That may go out.

Mr. THATCHER.—Go ahead with the terms of the offer.

The terms of the offer were that there was to be \$150,000 worth of preferred stock—

The COURT.—Now, what does this question refer to?

Mr. THATCHER.—Giving the terms of the offer.

The COURT.—Of what offer?

Mr. THATCHER.—To Mr. F. M. Taylor.

The COURT.—Well, go on.

WITNESS.—There was to be \$150,000, or sufficient preferred stock to take care of their indebtedness, issued; that stock was to pay seven per cent, and to be redeemable out of the first earnings [73—69] of the company; with that stock there was to be given one and one-half shares of common stock as a bonus; that common stock was to be given by me to Mr. Taylor out of the sixty-

(Testimony of David Taylor.)

two per cent of the common stock which I was to secure for services. It was on these conditions that Mr. Taylor gave me the \$25,000.

Mr. THATCHER.—(Q.) At that time, or at any of those times, did you show Mr. Taylor the map, Plate 5 in Mr. Bancroft's report and the figures put on there by you from the information given you by Mr. Poole? A. I did.

Mr. COOKE.—Objected to as not being part of the offer on which these parties were going into this venture.

Mr. THATCHER.—Well, it is part of the representations that he made in making the offer.

Mr. COOKE.—We contend that is immaterial.

The COURT.—I think the objection is good.

Mr. THATCHER.—I take an exception, if your Honor please, to the ruling of the Court.

The COURT.—No, as I understand it, Mr. Thatcher, we are simply trying to ascertain, and that is all this testimony is offered for, whether he did procure \$25,000 from his father in fulfillment of his obligation under the contract of April the 2d.

Mr. THATCHER.—I think that is correct.

The COURT.—Now, whatever representations he made to his father to induce him to make that contract, it seems to me are immaterial it is just what the agreement was between him and his father.

Mr. THATCHER.—(Q.) Now, Mr. Taylor, did Mr. F. M. Taylor give you the \$25,000.

(Testimony of David Taylor.)

A. He did.

Q. With reference to Mr. Brown, tell what took place with reference to Mr. Brown. [74—70]

A. Exactly the same thing, except that Mr. Brown instead of giving me the \$10,000 said, "You can have it whenever you need it."

Q. Now what other money did you have for this deal?

A. On the 20th day of May or the first of June, I had over \$80,000 in cash in the New York Trust Company, my own property.

The COURT.—(Q.) What date was that?

A. It was the 31st day of May or the 1st of June. Whether that was shown on their statement at the end of the month, or whether I asked them to give me a statement a couple of days before the end of the month, I am not quite sure.

Mr. COOKE.—Excuse me, how much did you say, Mr. Taylor?

A. Approximately eighty thousand.

Q. And the name of that Trust Company?

A. The New York Trust Company.

Mr. THATCHER.—(Q.) Did you have any other moneys, or securities?

Mr. WHEELER.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—You may answer the question.

A. I also had an arrangement with the New York Trust Company to borrow \$40,000, subject to my call; the notes were signed, the security attached; the notes were in the possession of the New

(Testimony of David Taylor.)

York Trust Company; they were to be deposited to my credit any time I telegraphed them to do so.

Q. (Mr. THATCHER.) What security did you arrange for that loan?

A. It was about a hundred tons of scheelite concentrates.

Q. What other securities did you have besides that? A. As security for that note?

Q. No.

A. I had various other stocks which were salable on the [75—71] New York Stock Exchange any moment, could have been converted into probably \$90,000 cash.

Q. Were those stocks quick assets?

A. They were.

Mr. COOKE.—(Q.) Did I understand that this last item of bonds and securities you say you could quickly convert into cash, was a matter of about \$90,000 worth? A. Yes.

Q. That does not include this \$80,000 you had?

A. It does not.

Mr. THATCHER.—(Q.) Does it include the \$40,000 of the loan arranged for on scheelite concentrates? A. It does not.

Q. It is in addition to all of it? A. Yes, sir.

Mr. THATCHER.—You may cross-examine.

Cross-examination.

Mr. WHEELER.—(Q.) Were you ever the manager or superintendent of a mine in Cottonwood Canyon or Cottonwood Creek, Utah?

A. Was I ever what, sir?

(Testimony of David Taylor.)

Q. Manager or superintendent? A. I was not.

Q. Did you ever have anything to do with a mine in Cottonwood Creek, Utah?

A. I had general business charge of a lease in American Fork Canyon in Utah.

Q. When was that? A. About 1906 or 1907.

Q. How big a mine was it?

A. It wasn't any mine at all.

Q. What was it?

A. It was an alleged lead silver mine.

Q. How long did the mine operate or attempt to operate during the time that you were thus connected with it? A. Six months to a year.

Q. Did you go out and visit it often? A. No.

Q. How often?

A. Probably half a dozen times.

Q. Go into the workings of the mine?

A. I did. [76—72]

Q. How long have you been engaged in your present business?

A. Special rare metal business, you mean?

Q. Yes. A. Since about 1910 or 1911.

Q. That business has involved the buying and selling of ores?

A. Buying and selling of rare ores and rare metals, some zinc ores.

Q. Prior to that time did you have anything to do with the buying and selling of ores?

A. As a clerk in the office of Taylor & Brunton Sampling Company.

Q. Have you had anything to do with the owner-

(Testimony of David Taylor.)

ship, or owning mines at any time?

A. Outside of the Miller lease in American Fork Canyon, I have not, unless you call carnotite deposits mines.

Q. In the course of your business, where you have been for yourself or an employee of others, or connected with other persons, have you or the concerns that you have been connected with, had occasion to advance moneys as against ore in mines?

A. No, sir, not ore in mines.

Q. With the concentrates produced from mines?

A. With the concentrates and ores produced from mines, that has been one of our businesses, part of our business.

Q. Part of your business has consisted of making advances as against concentrates or ores, has it not?

A. Yes, when they are ready for shipment.

Q. When they are ready for shipment. Occasionally your advances have exceeded, have they not, the actual amount of ore or concentrates ready for shipment?

A. Not unless I have made a mistake in estimating the amount.

Q. In the course of your business have you ever had occasion to examine properties to ascertain whether or not it would be wise or well for your people to undertake arrangements with them whereby you would advance money for ores or concentrates? [77—73]

A. I have not; I have had examinations made by other people for such purposes.

(Testimony of David Taylor.)

Q. Have you, yourself, ever had examinations made? A. Yes.

Q. In how many instances?

A. I could not tell you exactly.

Q. Have you yourself ever visited any properties to look at them to see whether or not it would be wise or well for your concerns with which you were associated, to enter into arrangements for the advancing of money as against ores and concentrates?

A. Not as regards the mines themselves, the conditions in the mine.

Q. You have, however, gone into mines, and looked at them under such circumstances as I have mentioned, have you not?

A. Never with the idea of passing on their values, or judging their values in any way.

Q. You have, nevertheless, gone into and looked at them?

A. I have gone into and looked at a good many mines.

Q. So I thought. A great many, have you not?

A. No.

Q. By a good many, how many do you mean?

A. I could not tell you exactly.

Q. What kind and character of mines, what ores were they producing, or supposed to produce?

A. Well, I should say gold, silver, lead, zinc, copper, tungsten, carnotite and molybdenite; I don't remember any others, there may have been.

Q. Is this the first tungsten mine you ever vis-

(Testimony of David Taylor.)

ited, or had anything to do with, either for yourself or for others?

A. I rather think it is the first tungsten mine I ever visited; I could not be absolutely sure.

Q. Are you absolutely sure?

A. I could not be absolutely sure.

Q. What other tungsten mines have you ever seen, either before or after seeing this?

A. I just told you I could not be absolutely sure whether this was the first one or not. [78—74]

(By direction the reporter reads the question.)

A. I don't know that I have ever seen any others.

Q. Are you sure that you have never seen any other? A. I am not sure.

Q. You say that you always have relied upon experts in these matters; what experts have you used, name them; either you or the concerns with which you are associated.

A. I could not tell you the experts used by the concerns I was associated with; the only one that I remember having myself engaged for that work was the superintendent and manager of the mine in American Fork Canyon, his name was Tommy Fitzgerald; I think he was later out here with the Tonopah Belmont. With the carnotite mines I have relied a great deal on the opinion of the mine foreman or superintendent, a man named Thurber. I have been present at one or two examinations, one long examination made by Mr. Bancroft and Mr. George Wilson; I have been with Mr. George Wil-

(Testimony of David Taylor.)

son on several trips where he has examined properties.

Q. In the course of the business, either of yourself or that with which you have been connected, it has been customary, then, has it to send out an expert to examine the properties?

A. It has not been customary, no.

Q. It has not been unusual for you then to do it?

A. I should say it had been rather unusual.

Q. You have relied in special instances, you say, on experts?

A. In certain instances, yes, as to where it was a question of buying a mine or not.

Q. And instead of relying on yourself you have relied on the advice of experts before putting money in, have you not?

A. When I have put any money in, yes.

Q. You have never put any money in a mine without having an expert, first have you? [79—75]

A. It depends on whether you consider a carnotite claim a mine.

Q. Other than that, then, you have never?

A. I don't think so, no.

Q. At the time the contract was entered into, a copy of which is annexed to the complaint, marked Exhibit "B," and also the contract marked Exhibit "A," what, if anything, was said to you with regard to the amount of ore in sight by any party or parties to the contract; I am referring now to the contract of date, January, 1919?

A. May I have that question, please?

(Testimony of David Taylor.)

(The reporter reads the question.)

A. I don't remember that anything definite was said as to the amount of ore that was in sight. This is the January contract, is it?

Q. What representation, if any, was made to you as to the value of the property, which caused you to enter into that contract of January, 1919?

A. It was the opinion given me by Mr. Bancroft that it had the possibilities of making a great mine, of being very valuable.

Q. At the time of entering into that contract, you intended and announced, did you not, you were to have Mr. Bancroft make an examination of the property for you? A. Yes.

Q. And it was understood at that time that he was to make it, was it not? A. It was.

Q. Mr. Bancroft examined the property, you say, and then made a report to you? A. He did.

Q. Do you recall the date of the report, it is in evidence here?

A. I don't recall the exact date; it was the beginning of February, I should say, somewhere about the 7th or 10th.

Q. How did you receive that report?

A. I received that report by mail.

Q. How long after its date did you receive it?
[80—76]

A. I could not tell you exactly.

Q. Approximately?

A. Approximately, oh, maybe five or ten days.

Q. Within five or ten days? A. Yes.

(Testimony of David Taylor.)

Q. Do you know whether or not you had received that report as early as the first day of March.

A. I do.

Q. Had you received it as early as the 20th day of March?

A. I had received it on the—20th day of March?

Q. Yes.

A. I received it on the 20th day of February.

Q. You read the report, of course. A. I did.

Q. You knew what Mr. Bancroft had said with regard to the amount of ore in sight and its value in that report? A. Approximately, yes.

Q. After getting that report—or rather what was the condition of the tungsten market at the time of the receipt of that report? A. It was very poor.

Q. It continued very poor from that time forward, did it not?

A. Yes, certain slight changes.

Q. Slight changes. Were there any changes, either for the better or worse, intermediate between the 20th day of February and the 2d day of April, 1919?

A. There are changes every day in the tungsten market.

Q. During all of that period of time was there ever a time when the market was other than very bad, and discouraging?

A. Numerous times when it looked very encouraging for a day.

Q. Was the condition of the market any better or any worse on the 25th or 26th or 27th day of

(Testimony of David Taylor.)

February, than on the 20th, 1919.

A. Will you repeat the question, please.

(The reporter reads the question.)

A. I could not tell you.

Q. You at all times were informed as to the condition of the market, were you not; you kept in touch with that in the course of [81—77] your business?

A. Yes, I got the best information I could; I may have been mistaken at times.

Q. I hand you a letter dated February 24th, which has been received in evidence as Plaintiff's Exhibit 1, and ask you to examine it. (Hands to witness.) Are you familiar now with its contents?

A. Generally, yes.

Q. That is your signature? A. Yes.

Q. I call your attention to the first paragraph: "In view of the present tungsten situation, I do not believe there is the remotest chance of interesting anybody in the purchase of a property at a half million dollar price." Do you recall that statement? A. Yes.

Q. And it was the fact at that time that the tungsten situation was very bad?

A. In my opinion it was.

Q. "The best thing to do all around," you say here, "would be to close down." It was your opinion that the market was so bad that it was well to close down?

A. It depends upon what you call bad. There was a very large stock of imported tungsten in this

(Testimony of David Taylor.)

country, surplus war stock which had not been gotten rid of.

Q. It was your opinion the best thing to do at that time was to close down, was it not?

A. It was.

Q. Now I call your attention to the following paragraph of this letter: "I understand your present position will not allow you to do this without payment of \$170,000 debts. On your estimated production costs, you should realize a net profit of about \$55,000 from the money advanced by me on concentrates. This would leave a net balance, I figure, of about \$115,000 debts. If I can arrange to advance this money, would you consider the sale of the stock to me on a basis of twenty-eight cents per share," and so forth. It is the fact, is it not, that as early as February 24th [82—78] and after receiving Mr. Bancroft's report, you were making the suggestions contained in this letter, notwithstanding the known condition of the tungsten situation?

Mr. THATCHER.—I object, the letter speaks for itself.

The COURT.—You may answer the question.

Mr. WHEELER.—(Q.) I call your attention to the following paragraph in this letter; after the matters therein contained of your suggested offer are these words: "This means that you would be giving me a one-half interest in the mine for liquidating your present indebtedness." Do you recall that statement?

(Testimony of David Taylor.)

A. I recall something of that kind, yes.

Q. It was then, on the 24th day of February, after you had Mr. Bancroft's report of this mine, the fact, was it not, that you would have been willing to enter into an arrangement for liquidating this corporation's indebtedness upon a basis of fifty per cent of the stock of the corporation?

A. It seems to me you will find,—as I remember, you will find some additional conditions in that letter.

Q. I am asking the state of your mind.

A. It states that stock was to be paid for out of the earnings, of the profit.

Q. I understood it was to be paid for out of the earnings; the stock was to be paid for out of the mine, of the profit; but the effect of it was that you would get a one-half interest in the mine for liquidating their debts, present indebtedness.

Mr. THATCHER.—I object on the ground the letter is the best evidence of its contents.

Mr. WHEELER.—I will reframe that question then.

Q. Was it or was it not true at that time, to wit, February 24th, that you were willing to enter into an arrangement for the liquidating of the indebtedness of this corporation upon terms that would [83—79] mean that the stockholders would give you a one-half interest in the mine for so liquidating the indebtedness?

A. I don't think that was a formal offer; that was the suggestion of the basis of negotiations, and

(Testimony of David Taylor.)

rechanged; the change so modified the option that it would be best for me to go through with it.

Q. But if modified in that way, you were willing to go through with it?

A. I merely made that as a tentative proposition.

Q. It was your proposition, and if accepted you would be willing to go through with it, would you not?

A. I said I made it as a tentative proposition; I don't know whether I would be willing to go through with it or not.

Q. Can you not tell us whether you would or not?

A. I cannot.

Q. So with Mr. Bancroft's report before you, reporting only 8100 tones of ore in sight, you cannot tell us whether or not you were willing to undertake this matter upon a basis set forth in the letter of February 24, 1919?

A. I cannot exactly.

Q. You would not say whether you would or not?

A. I would not, sir.

Q. I hand you plaintiff's Exhibit 12, dated March 25, 1919, and I call your attention to the following passage: "The general basis of a readjustment which I have in mind is some basis on which cash be furnished for the liquidation of all the company's indebtedness plus my ability to acquire the stock, or 75% of it, on a basis of paying for the stock out of future earnings. I believe that the most one could count on a possible purchaser doing at present would be to furnish enough cash or

(Testimony of David Taylor.)

guarantee to clear up all the indebtedness." Were you or were you not willing at the time you wrote that letter, March 25, 1919, to enter into an arrangement whereby you would secure the furnishing of this money to liquidate the indebtedness upon a basis that you should receive 75 per cent of the stock? [84—80]

A. I could not tell you whether I was or not; those proposals were all tentative.

Q. At any rate you were favorably inclined at that time to such an arrangement?

A. I was favorably inclined to any equitable arrangement for the property, taking in all the conditions.

Q. So you will not now say whether or not you were willing to have done this for 75 per cent of the stock, and that there was nothing in the nature of a proposition from you, as you understood it, contained in this letter?

A. No binding proposition, no.

Q. At any rate, will you say that it was not the state of your mind at that time that you would have accepted an arrangement whereby you should furnish the money to liquidate the indebtedness, for 75 per cent of the stock of the corporation?

A. I will not make any statement as to just what was in my mind at that time, because I could not tell you, sir; that was before, as I remember, the additional tonnage of ore that was stated to have been developed.

Q. I hand you Plaintiff's Exhibit 10, purporting

(Testimony of David Taylor.)

to be a telegram from L. A. Friedman to you, dated March 25th, and particularly I call your attention to the following passages therefrom: "Conclude from your correspondence that you feel unable to exercise your present option owing to depressed tungsten market condition and therefore we must anticipate your possible failure to exercise your option. Suggest that you and Bancroft come here some time this week as all stockholders are here now and am sure you will find mine development fulfilling your most sanguine expectation and am confident that we could arrive at some modified arrangement as suggested in your correspondence." You recall receiving that telegram? (Hands to witness.) [85—81]

A. Yes.

Q. Did Mr. Friedman, or any of the defendants in this action, ever suggest to you that you should not visit the property with Mr. Bancroft, and examine it any time prior to the entry into this contract Exhibit "C," dated the 2d day of April, 1919?

A. That they ever suggested that I should not?

Q. Yes, or that you should not have Mr. Bancroft make the examination? A. They never did.

Q. So far as you are aware, then, they were willing at all times, and had invited you to make the examination with Mr. Bancroft?

A. I don't know that they had invited me to; they were willing for me to make it, so far as I know.

(Testimony of David Taylor.)

Q. You did not regard this as an invitation, then, to make the examination: "Suggest that you and Bancroft come here sometime this week as all stockholders are here now and am sure you will find mine development fulfilling your most sanguine expectation"?

A. I should say that was an invitation to come to Lovelock and negotiate a change in the form of contract.

Q. As a matter of fact, this was the one occasion in your life, was it not, when you entered into this contract of April 2d, that you intended to go into a transaction involving a mine, without having expert advice of your own?

A. I didn't necessarily; I considered that I had expert advice from the statements of Mr. Poole, in whom I had implicit confidence.

Q. But you had no intention whatever of having Mr. Bancroft examine the property?

A. I had no intention one way or the other at that time; the arrangements were made with Mr. Bancroft later on.

Q. Do you recall sending Plaintiff's Exhibit 11 to Mr. Friedman, containing the words, "Bancroft out of town impossible leave Denver at present."

A. Yes. [86—82]

Q. I call your attention again to Exhibit 12, the following statement: "Your day letter of the 24th reached me duly and I was sorry to have to wire you to-day that neither Bancroft nor I could come

(Testimony of David Taylor.)

to Lovelock at present. Bancroft has been away on an examination for ten days and will not return to Denver until April 1st. He leaves Denver about April 10th for a two-months examination, and during the ten days he is here he will be pretty busy preparing his report on the examination he is now making. I have some negotiations on for the purchase of a chemical plant in Denver, which will probably drag along until about the 10th of April, so that I cannot leave before then." Do you recall sending that letter?

A. I recall something of that kind; whether it is the exact wording I could not tell you unless I saw the letter.

Q. As I understand you, you had a talk with Mr. Murrish and Mr. Poole and Mr. Nenzel in Denver on the following dates, Sunday, the 30th day of March, 1919, Monday, the 31st, Tuesday, the first day of April, and Wednesday, the 2d; is that right?

A. Approximately; I could give you the exact date, if you wish me to, I have my diary.

Q. Give the exact dates on which you had conversation if not on those dates; if on those dates, say so.

A. Sunday, March 30th, 31st, April 1st and April 2d.

Q. 30th, 31st, the 1st and 2d? A. Yes, sir.

Q. Where did you see the gentlemen first on Sunday, the 30th day of March? A. In my office.

Q. Did you not go to the hotel first, and go with

(Testimony of David Taylor.)

them in the automobile from the hotel to your office? A. No, sir.

Q. What did you do on that day with the gentlemen, or how long were you with them? [87—83]

Mr. THATCHER.—Did you want to make an explanation?

A. To the best of my knowledge, I did not. I took them out various times during those dates in an automobile. As I remember that meeting, I was at home, at lunch when they got in, and one of them telephoned and said they would like to see me that afternoon; it is barely possible I might have stopped at the hotel and picked them up and taken them to my office; or I may have gone direct to my office, and had them come there and meet me.

Mr. WHEELER.—(Q.) How long were they in your office on that day?

A. I don't remember exactly; I should say a couple of hours, or an hour.

Q. At that time were all three of them present, or had one or two of them gone?

A. I think they were all present, because I think I took them home; I think I took them for a ride that afternoon; as I remember, I took Mr. Murrish up to his house, and dropped him, and took Mr. Poole and Mr. Nenzel for a ride.

Q. What was said on that day with reference to the proposed option?

A. There was a general discussion; I think various different terms were discussed, and various

(Testimony of David Taylor.)

different arrangements were discussed, *pro* and *con*,

Q. On that day what, if anything, was said or represented to you by any person with regard to the quantity of ore in the mine, that Sunday?

A. It was generally represented and stated that the conditions of the mine looked very good; whether specific figures given by Mr. Poole later, were mentioned at that time, I can't remember. I gave Mr. Poole the report, and asked him that night to put the definite figures on the report.

Q. Was anything at all said on that Sunday with regard to the quantity of ore in the mine? [88—84]

A. I could not tell you exactly, except the conditions of the mine looked very good.

Q. And that is all you recall was said on that day?

A. I don't recall particularly what was said on that day.

Q. On that day was anything said with regard to the proposed terms upon which you would take the option?

A. The various terms of various forms of option were discussed by both sides.

Q. Did you make any proposition on that day, setting forth the terms on which you would take an option?

A. I don't think any definite proposition was made.

Q. Did you make any proposition as to terms, definite or indefinite, and if so, what was it?

(Testimony of David Taylor.)

A. I think terms were suggested by me and suggested by them, but were left for discussion.

Q. What was said by you as to what you were willing to do?

A. I could not tell you exactly.

Q. Have you no recollection?

A. Nothing definite.

Q. Can you give us the substance of what you said as to what you were willing to do on that Sunday

A. I was willing in a general way at that time to make a contract according to the terms that were finally arranged.

Q. Did you say that?

A. I don't remember whether I did or not.

Q. Did you propose any other terms on that date?

A. I don't remember whether I proposed any terms that day.

Q. Did you suggest any terms or make any offer that day?

A. I presume we made various suggestions, as the other people did.

Q. Did Mr. Murrish say anything that day to you with regard to the condition of the mine?

A. I can't remember exactly. [89—85]

Q. Or Mr. Nenzel, did he say anything to you with regard to the condition of the mine?

A. I could not tell you.

Q. Did Mr. Poole say anything to you with regard to the condition of the mine?

(Testimony of David Taylor.)

A. I could not tell you exactly who said it; the general statement made was that the general conditions of the mine were very good; as to who made that statement, it presumably would have been Mr. Poole.

Mr. WHEELER.—I move to strike out it presumably would have been Mr. Poole.

The COURT.—It may go out.

Mr. WHEELER.—(Q.) What hour did you meet again after parting on Sunday, the 30th of March?

A. I could not tell you the hour.

Q. Where did you meet?

A. In my office.

Q. Was it in the forenoon or afternoon?

A. Forenoon.

Q. Who was present on that occasion?

A. Throughout the whole meeting, or at different times.

Q. Well, let us start at the beginning; Who was in the office when these gentlemen first came in?

A. I was.

Q. Anyone else?

A. I don't remember whether anybody else may have been or not.

Q. Were the three gentlemen together when they came in?

A. My impression is that Mr. Murrish came in later; whether Mr. Poole and Mr. Nenzel came in at the same time, or one was a few minutes behind the other, I don't know.

(Testimony of David Taylor.)

Q. Now please repeat what was said on that day in the course of your conversation; give the substance of it, the whole conversation, who was present at the time it was said, and who said it.

A. I could not tell you definitely who was present, or everything that was said. I think I first asked Mr. Poole if he had put the figures, showing recent developments, tonnage blocked out, values [90—86] and mine conditions, on the Bancroft map which I had given him the night before; Mr. Poole replied that he had not had opportunity to do so, or words to that effect; I then asked him to put them down there, give them to me at that time, which he did. Mr. Nenzel was there off and on, just when he came in, at what point of the conversation, I could not tell you.

Q. Had Mr. Murrish come in during any part of that conversation?

A. Mr. Murrish was there during some of it.

Q. Do you know what was said when Mr. Murrish was present? A. No.

Q. Can you mention anything that was said when Mr. Murrish was present?

A. No, because I don't know exactly when Mr. Murrish came in.

Q. A photostat had been made of some map, for the exhibit annexed to Mr. Bancroft's report seems to be such; did you have more than one photostat copy of that map?

A. Did I have more than one photostat copy?

(Testimony of David Taylor.)

Q. Yes.

A. I don't know whether I had any photostat copy. I don't know whether there were any photostat copies or not; I had that map and Mr. Bancroft's report, and I think at that time I had a duplicate report of Mr. Bancroft's.

Q. What was it that you gave in the shape of a report or map to Mr. Poole?

A. I gave Mr. Poole Mr. Bancroft's report intact.

Q. With the map annexed?

A. With everything in it that was in the original report.

Q. Including the photostat map?

A. I don't know whether it was a photostat map or not.

Q. Including the map that has been offered here in evidence. A. Yes.

Q. That identical map?

A. Yes, sir. [91—87]

Q. On the day that the conversation took place, Monday, the 31st, you say there was another map present?

A. I said that Mr. Poole had a roll of maps, big tall roll of maps of some kind.

Q. Was there any other copy, similar in whole or in part, to the map annexed to the report of Mr. Bancroft?

A. I had a duplicate of Mr. Bancroft's report, whether I had that at that time or not I do not know; every report I had of Mr. Bancroft's was

(Testimony of David Taylor.)

complete in every detail, and had all the maps.

Q. Did you have no extra map there, similar to the one annexed to Mr. Bancroft's report?

A. I just told you, sir, I don't know whether I had Mr. Bancroft's duplicate report or not.

Q. Apart from the duplicate report, did you have any other copy of that map? A. I did not.

Q. The figures and the lines upon that map were placed there by you, were they?

A. Which map are you speaking of?

Q. On the photograph map, the figures that were placed that day upon the photograph map were placed there by you? A. Yes, sir.

Q. Did Mr. Poole participate at all in any way in putting down a figure or in drafting a line.

A. You mean whether he actually put them upon the map?

Q. Yes.

A. No, he did not put anything on the map, as I remember it.

Q. Had you done any mapping, or made any addendum to any map on the preceding day, Sunday?

A. No, the map was given to Mr. Poole—I want to make one correction in my statement; on that map there was one—I think it was on level number two, one point at which I had put down approximately some fifty or sixty feet of development work, with assays that were [92—88] given me in a previous telegram by Mr. Nenzel; I think that was on the map when I gave it to Mr. Poole.

(Testimony of David Taylor.)

Q. So Mr. Poole himself put that on the map?

A. Mr. Poole didn't put anything on it.

Q. Oh, you put it on the map when you gave it to Mr. Poole, and that— A. (Intg.) Hold on.

Mr. THATCHER.—That is not his testimony.

Mr. WHEELER.—Please repeat your answer, I didn't get it.

A. My answer was that on that map, I think when I gave it to Mr. Poole, there was a pencil notation, which had been put on by me February 24th.

Mr. THATCHER.—(Q.) Could you tell from the map exactly? A. Yes.

Mr. WHEELER.—(Q.) Was any figuring done that day, Monday, or that day Sunday, in your presence or by you, in estimation of the amount of ore in the mine?

A. No amount of figuring; there may have been a little figuring done by Mr. Poole; he may have given me some figures to calculate; I may have done some multiplying or adding.

Q. Not what you might have done, I want the fact. Did you make some figures?

A. I made no figures of my own to put down on the map; Mr. Poole may have said multiply a certain amount to me.

Q. I am not asking you what you might have done, I am asking the fact. Did you put any figures on the map?

A. To make any figures of my own I did not; I

(Testimony of David Taylor.)

have never done any calculating of ore in a mine, because I don't know how to do it.

Q. So you did nothing in the way of calculations on that day Monday, or preceding it, Sunday?

A. I may have done some calculating.

Q. Please don't answer what you may have done; I want what you did [93—89] do; I want your recollection. A. I have given my recollection.

Q. That you did not?

A. I did not say that; I said I may have done it, or I may not have done it.

Q. In other words, you mean to say you are not positive? A. Yes.

Q. When you say you may have done this or that, you mean to say you are not positive whether you did or not, and will not say whether you did or not?

A. That is just what I mean, sir.

The COURT.—(Q.) Did you say you never had figured or calculated the amount of ore in a mine?

A. The amount of ore in a mine, because I am not competent to calculate it, I may have taken figures given me, and multiplied out areas into cubical contents.

Mr. WHEELER.—(Q.) Did you either on Sunday or Monday state in the presence of Mr. Nenzel, Mr. Murrish and Mr. Poole, that Mr. Bancroft's method of computation was by figuring out where he had two sides, or three sides; where he had three sides, an isosceles triangle?

(Testimony of David Taylor.)

A. I don't remember whether I did or not, Mr. Bancroft's method of calculation shows.

Q. Did you not proceed to describe what Mr. Bancroft's method was of arriving at the quantity of ore in a mine?

A. Whether I did or not, I do not know.

Q. You were familiar with his method, and you did know that he used figures, such as isosceles triangles, under some conditions, and such as squares or other figures under other conditions, did you not?

A. I didn't get the question.

Q. You knew Mr. Bancroft's methods of figuring, did you not?

A. Mr. Bancroft had told me what they were. [94—90]

Q. So you were not altogether ignorant of the method employed by Mr. Bancroft of computing the quantity of ore in this mine?

A. I was ignorant of sizing up how the figures were obtained.

Q. He told you how he got the figures and the methods of calculation he went through?

A. He did not tell me.

Q. He told you the methods of calculation he employed?

A. Anybody who has studied trigonometry could tell you.

Q. And that method was not too difficult for you to understand; you knew how to do it, did you not?

(Testimony of David Taylor.)

A. It is a question of multiplication and division.

(At 12:00 o'clock a recess is taken until 1:30 P. M.) [95—91]

Wednesday, September 15th, 1920.

After Recess. 1:30 P. M.

The COURT.—Take the stand, Mr. Taylor.

Mr. THATCHER.—If the Court please, with the consent of counsel, I would like to put Mr. Bayless on the stand, so he may return to San Francisco.

The COURT.—Very well

Testimony of W. S. Bayless, for Plaintiff.

Mr. W. S. BAYLESS, called as a witness on behalf of plaintiff, after being sworn, testified as follows:

Direct Examination by Mr. THATCHER.

Q. Your name is W. S. Bayless? A. Yes, sir.

Q. You reside in San Francisco? A. I do.

Q. What is your business or profession?

A. Lawyer.

Q. Do you know Mr. David Taylor? A. I do.

Q. Do you know Mr. Jackson? A. Yes, sir.

Q. Do you know any of the defendants in this case? A. Yes, sir.

Q. Who do you know?

A. Well, I know Mr. Poole, Mr. Nenzel, Mr. Murrish, I don't know whether Mr. Friedman is a defendant or not; I never have seen the pleadings in this case, so I don't know.

Q. You know Mr. Murrish and Mr. Nenzel?

(Testimony of W. S. Bayless.)

A. Yes, sir.

Q. And Mr. Poole? A. Yes, sir.

Q. Mr. Jones? A. Yes, sir.

Q. Did you meet any of these folks in San Francisco at any time? A. Yes, sir.

Q. Where and when?

A. Well, in San Francisco, about the 2d of June; it was on Monday, and for a number of days thereafter.

Q. June, 1919? A. Yes. [96—92]

Q. At that time were you attorney for Mr. Taylor? A. Yes.

Q. And acting as one of his counsel at that time?

A. Yes, sir.

Q. Will you state how many conversations or meetings there were between the parties?

A. I don't exactly know how many; they were rather frequent during that week. We first met on Monday, and had a number of conferences and meetings afternoons, and one in the evening during that week; just how many I don't remember.

Q. Were you present at the first conference that was held on Monday? A. Yes, sir.

Q. In your office? A. Yes, sir.

Q. State who was present?

A. Mr. Jackson, Mr. Taylor, Mr. Poole, Mr. Nenzel, and I think Mr. Murrish. I am not sure I remember the others.

Q. Will you state what took place, what conversation took place at that time?

A. Previous to—well, about nine o'clock or shortly

(Testimony of W. S. Bayless.)

thereafter, Monday morning, June 2d, Mr. Jackson and Mr. Taylor appeared at my office, and thereafter Mr. Nenzel and Mr. Poole, and possibly Mr. Murrish, I don't remember, also appeared; Mr. Jackson made a general statement; I am unable to quote his exact language.

Q. Do you know whether Mr. Jones was present at the first meeting?

A. I don't remember whether he was or not. He may have been.

Mr. COOKE.—C. H. Jones?

Mr. THATCHER.—One of the defendants. Go ahead, Mr. Bayless.

A. I cannot give you the exact language.

Q. Well, give the substance of it.

A. The substance of it was this: Mr. Jackson announced to those gentlemen mentioned that he represented Mr. Taylor, that he had come from New York and had met Mr. Taylor for the purpose of closing this up for Mr. Taylor; that in view of the fact the mine was not as represented, it was impossible for Mr. Taylor to take up [97—93] his option, however, Mr. Taylor was willing to take over the property on some different terms, that is, he would like to modify the option in some equitable way, and would like to discuss that proposition with them; he further mentioned that Mr. Taylor had performed all the services he had said he would perform in order to receive the compensation allowed him in this option, and was there for the

(Testimony of W. S. Bayless.)

purpose of making some different arrangement, if it could be agreed upon.

Q. Well, did Mr. Jackson at that time state the arrangement which Mr. Taylor was willing to make?

A. Mr. Jackson reviewed the whole situation generally, and stated what Mr. Taylor was willing to do.

Q. What did he state that Mr. Taylor was willing to do, if you recollect?

A. As I recollect, Mr. Taylor was willing to advance about \$75,000 in place, I think it was \$161,000, or \$160,000 which the debts amounted to; Mr. Taylor was willing to advance \$75,000, which money was to be used to pay all the company's obligations under \$500, and to be pro-rated among the creditors whose claims exceeded that amount; and he was also willing to advance about \$10,000, to be used as working capital, and for that he expected to receive, I think it was 62 per cent interest in the common stock of the company to be formed to operate the mine, and to have a lien on the ore blocked out as security for these advances; also of the right to operate the mill of the Tungsten Products Company, I think it is, during the period this arrangement was in force.

Q. Do you recall whether or not any further money was to be paid upon any condition of subsequent development of ores?

A. Yes, if that arrangement met with the approval of the company, the mine was to be operated, and if the operations developed sufficient commer-

(Testimony of W. S. Bayless.)

cial ore to justify it, Mr. Taylor would advance [98—94] them the further sum, I think, of about \$65,000, which would be used then to pay off all the creditors.

Q. Do you know what attitude, or statement the defendants present took or said with reference to this proposition? A. Yes, sir.

Q. What was it?

A. Mr. Poole I think was the spokesman, and from time to time as Mr. Jackson proceeded with the statement of fact, he would say, "Now if I am wrong I wish you gentlemen would correct me," particularly regarding these representations or misrepresentations; and Mr. Jackson would say, "Well, now, is not that so, Mr. Poole," and on a number of occasions Mr. Poole would say, "Yes, that is so," and he would speak to the other men present and ask them if that wasn't so, and they never directly replied except by nodding their heads to its being so.

Q. Do you recollect a meeting held on Friday night, or the night before the creditors' meeting?

A. Yes; in order to get the continuity of these events—

Q. Go ahead.

A. I should state we had frequent conferences on this subject for the purpose of discussing the new arrangement, and the gentlemen representing the company negotiated with Mr. Taylor and Mr. Jackson for the best deal they could make. Finally Mr. Jackson drew up a contract; we agreed verb-

(Testimony of W. S. Bayless.)

ally, I think about Wednesday on the terms of the new arrangement, then there was a question of reducing this verbal agreement in writing; some suggested Mr. Murrish draw up the contract; he suggested I do it; I suggested Mr. Jackson; everybody was willing for Mr. Jackson to draw the contract, and he retired to do so, and delivered the contract to one or the other of the men I have mentioned some time on Friday, the following Friday; they looked over the contract, and we agreed to meet in my office at seven-thirty Friday evening. My recollection is when we met those present were Mr. Jackson, Mr. [99—95] Taylor, Mr. Poole, Mr. Nenzel; I don't think either Mr. Murrish or Mr. Jones came over to my office at that time. Mr. Jackson asked Mr. Poole what he thought of the contract; Mr. Poole said he had no changes to make; that it was a hard bargain from their point of view, but in view of the existing conditions they could do no better; they were satisfied with the contract, had no modifications or suggestions to offer. Mr. Jackson told them not to hesitate to suggest changes, because the draft he had submitted was merely a tentative draft, and that he himself had a number of suggestions that he would like to make. Mr. Poole said, "That is all right, we will take the contract as it stands, provided our creditors will permit us to sign it"; he says, "We have called a meeting of the creditors, as you know; the creditors will meet on Saturday morning, tomorrow morning; we will ask the creditors to approve of this contract; if they do we will sign it up."

(Testimony of W. S. Bayless.)

My recollection is we all shook hands, and disbursed to meet following the creditors' meeting the next day.

Q. Did you go to the creditors' meeting?

A. Yes, I went to the creditors' meeting.

Q. Did you go as Mr. Taylor's attorney at that meeting?

A. No, Mr. Taylor wasn't invited to be present, neither was Mr. Jackson; a friend of mine, Percy Pettigrew, had a claim against the company, I think, and he was out of town and asked me to look after his interest, so I received a notice as Pettigrew's representative to appear at the creditors' meeting, or to be present at the creditors' meeting; I was there representing a creditor.

Q. Do you recollect whether or not Mr. Poole was present at the creditors' meeting?

A. Yes, sir, I recollect.

Q. Was Mr. R. Nenzel present?

A. Yes, Mr. Nenzel, Mr. Poole and Mr. Murrish.
[100—96]

Q. Do you recollect whether or not Mr. Goodin was present? A. Yes, he was there.

Q. Do you recall whether or not Mr. Jones was present at that meeting?

A. I don't remember whether he was there or not.

Q. Do you know whether or not Mr. Hinch or Mr. Twigg, Mr. Friedman or Lena J. Friedman were present?

A. No, I know Mr. Friedman wasn't there; Mrs.

(Testimony of W. S. Bayless.)

Friedman wasn't there; I don't know the other people.

Q. Did Mr. Poole, Mr. Murrish, or Mr. Nenzel, or Mr. Goodin ask the creditors to enter into this contract, or approve it? A. No, sir.

Q. What did they do?

A. They asked the creditors, in substance, to extend payment of their indebtedness for their various claims, saying that if the creditors would give them time, they could work the mine, pay off all the claims in full, and they would not be under the necessity of making this contract with Mr. Taylor.

Mr. THATCHER.—You may cross-examine.

Cross-examination.

Mr. WHEELER.—(Q.) At this creditors' meeting was any document presented? A. Yes, sir.

Q. Was it read in whole or in part?

A. Yes, sir, in part.

Q. When they got to a certain point in that reading was anything said by any of the creditors?

A. Yes, sir.

Q. What?

A. I would not pretend to say just the exact language.

Q. Don't say it in the exact language, give us the substance of it.

A. A number of the creditors got up and announced that they considered the bargain unfair, and they would stand by the company, would extend payment for their various claims, and were not in favor of— [101—97]

(Testimony of W. S. Bayless.)

Q. (Intg.) By the contract, what contract do you refer to?

A. To the contract read by Mr. Poole, and I think by Mr. Murrish; the contract which Mr. Jackson had submitted to them.

Q. Do you mean a contract that had been previously made and actually entered into, or do you mean this draft contract? A. This draft contract.

Q. Proceed, please; what did the creditors say?

A. I think I told you about all.

Q. In other words, they declined to enter into that contract?

A. The creditors took the position that they would extend the time, and were not in favor of the company entering into this engagement.

Q. On the day that the contract was drafted—

A. (Intg.) I beg your pardon, if you will permit me, I will make an explanation right there. When this contract was read, it was read in such a way that the creditors got the impression it was a much unfairer contract than it was.

Mr. WHEELER.—I move to strike that out as volunteered.

The COURT.—That may go out.

Mr. WHEELER.—(Q) Did the creditors, or any of them, so far as you know, ever assent to that contract, or proposed contract?

A. No, on the contrary, none of the creditors, as far as I know, ever assented to it.

Q. The contract that was presented on that occasion was what contract; was it Exhibit 17 just as

(Testimony of W. S. Bayless.)

it appears, or was it Exhibit 17 with certain modifications which had been proposed by Mr. Jackson?

A. I don't know your exhibits in this case. I saw the draft offered in evidence this morning. It is the paper which was placed in evidence during Mr. Taylor's testimony this morning.

Q. It is the same paper, yes. When did you first see that paper [102—98] Mr. Bayless, I now hand you; I am referring to a document not yet identified otherwise that as beginning, "This agreement made in several counterparts, which together shall constitute one original."

Mr. THATCHER.—I object to the use of the instrument, or any reference to it, on the ground it is not yet in evidence.

The COURT.—He may identify it if he can.

WITNESS.—Is this the paper Mr. Taylor was testifying about?

Mr. WHEELER.—Yes, the one exhibited to him this morning.

A. I have not seen it for over a year. Yes, I think this is the one.

Q. Was that present at the creditors' meeting?

A. Yes, this draft drawn by Mr. Taylor, submitted to Mr. Nenzel and Mr. Poole, was partially read at the creditors' meeting; I don't think all of it was.

Q. I am asking if the draft of the contract, together with the items that you have just identified, were offered at the creditors' meeting, and were a part

(Testimony of W. S. Bayless.)

of the offer that was then before the creditors, whether it was all read or not?

A. Well, I just mentioned—

Mr. THATCHER.—The paper itself is in evidence.

The COURT.—He can't ask as to the contents of that document until it is admitted, but he can ascertain whether that was the document which was present.

Mr. WHEELER.—That is all I am seeking to do, your Honor.

WITNESS.—Yes, substantially this is it; there may be some changes in it; my recollection is that the document submitted to the creditors was complete in itself, and didn't have any corrections or modifications attached.

Q. Then you say that Mr. Jackson had said that he wanted certain modifications; that the draft was only tentative; that he had said [103—99] that at a meeting in your office? A. Yes.

Q. And did he present the modifications that he desired in written form?

A. He may have, I don't recollect; I haven't any clear recollection on that point. My recollection is, as I have mentioned, that Mr. Poole said he had no corrections to make, they would accept the contract as it stood, and would sign it if the creditors approved; and Mr. Jackson didn't then hand Mr. Poole his suggested corrections.

Q. You saw the suggestions at that time, though, did you not?

(Testimony of W. S. Bayless.)

A. At that time, or before, or afterwards, I am not clear.

Q. You are clear, however, that among Mr. Jackson's suggested corrections was a provision that at least 95 per cent of the creditors of the corporation must agree, are you not?

A. No, I haven't any clear recollection at this time; I saw that memorandum this morning.

Q. And you had seen that memorandum before, about a year ago, as I understood you?

A. I probably had, but I have no recollection of that.

Q. So really the fact is that you can't tell us what the precise instrument was that was presented to these gentlemen in your office?

A. Yes, I can tell you.

Q. Well, then you can tell us whether or not it was accompanied by Mr. Jackson's proposed modification, involving the question of the consent of 95 per cent of the stockholders, can you?

A. I don't recollect those modifications.

Q. Then you can't tell me whether or not it contained that provision, can you, or was accompanied by that provision?

A. No, I can't, I can't tell you that.

Q. And you can't tell whether the document presented to the creditors [104—100] contained that provision, or was accompanied by that provision, can you? A. No, for the reason—

Q. I just asked the fact? A. No, that is true.

(Testimony of W. S. Bayless.)

Q. You were employed to go to Lovelock, weren't you, in the course of this transaction? A. Yes.

Q. You went there? A. Yes.

Q. Along in May? A. Yes.

Q. Were you employed through an oral conversation, or did the employment come to you through a telegraphic communication?

A. Through a telegram from Mr. B. L. Thane.

Q. Were you employed by Mr. Thane alone, or were you employed by him and Mr. Taylor?

A. No, I was paid eventually for my services by Mr. Taylor; Mr. Thane and Mr. Taylor were in New York; I didn't know Mr. Taylor at that time.

Q. But you acted for him in the matter, and you so understood at the time you were rendering services, did you not?

A. It wasn't quite clear who I was acting for at that time; I merely got a telegram from Mr. Thane asking me if I would go over and examine the title.

Q. Have you the original of that telegram?

A. I think I have somewhere in my files.

Q. Is it with you here? A. I think so.

Q. Will you please search for it now, and identify it; I refer to telegram dated the 14th day of May, 1919.

Mr. THATCHER.—I have a copy of it right here.
(Witness searches his files.)

Mr. WHEELER.—(Q.) Haven't you the original?

A. The file is very voluminous; I have not been

(Testimony of W. S. Bayless.)

able to locate it in just hurriedly going over it.
[105—101]

Q. Have you nothing to indicate telegrams received May 14, 1919, or dated that day?

A. My file is a little out of order right now. Here is a substantial copy of it; I think it is substantially that. (Hands to counsel.)

Q. I hand you what purports to be copy of telegram dated May 14, 1919, and ask you if that is a copy of the original of a telegram received by you on or about said date?

A. I am reasonably certain that is substantially the same as the original.

Q. And that is the telegram under which you entered the employ which was subsequently paid for by Mr. Taylor? A. It is.

Mr. WHEELER.—We ask that it be marked our Exhibit “A” for identification.

(Telegram dated May 14, 1919, is marked Defendants’ Exhibit “A” for identification.)

Mr. WHEELER.—I understand any objection on the ground that the original is not produced of Exhibit “A” for identification, is waived?

Mr. THATCHER.—Yes. I don’t know whether I will object to it at all if you want to put it in; the matter is purely confidential, but if you want to, put it in.

Mr. WHEELER.—As long as the witness has been put on the stand out of order, we thought proper to have it identified at this time.

(Testimony of W. S. Bayless.)

Mr. THATCHER.—We will admit that is a copy of the telegram sent by Mr. Thane to Mr. Bayless.

Mr. WHEELER.—That is all.

Redirect Examination.

Mr. THATCHER.—(Q.) I call your attention to plaintiff's Exhibit 17, and ask if you ever saw that before. (Hands to witness.)

A. That is the draft of the agreement prepared by Mr. Jackson, [106—102] and submitted to Mr. Nenzel and Mr. Poole.

Q. Do you know whether or not that particular copy was your office copy, sent by you to me?

A. No, I don't recognize it as that; I remember sending you one.

Q. You haven't any copy in your files at the present time, have you, or do you know?

A. I don't think I have; I think I asked you to send this back, and you didn't do it.

Q. Now is this the contract that was read before the creditors' meeting?

A. Yes, that is the contract.

Q. Was all of this read? A. No.

Q. How much of it was read, if you recollect?

A. I can't say.

Mr. COOKE.—What paper are you referring to?

Mr. THATCHER.—Plaintiff's Exhibit 17.

WITNESS.—I don't know just how much was read.

Q. In what way was it read, and by whom?

A. Mr. Poole read the contract.

(Testimony of W. S. Bayless.)

Q. Before reading the contract, or as he read it, did he make any comments upon the contract?

A. Yes.

Q. What did he say?

A. I don't recollect his exact language.

Q. Can you give the substance of it?

A. I don't think I could give all of the substance, but he outlined the position of himself and his associates and his company, who he claimed to represent; in this connection he stated that the agreement was a very hard bargain, that he and his associates didn't wish to sign it, but would do so if the creditors insisted; and he informed them that this was the contract Mr. Taylor wished to make, and read them parts of it.

Q. Did he at that time, or any of the other defendants who were there present, endeavor to persuade the creditors to sign or to consent to that contract?

Mr. COOKE.—I object to that; I think he should state what [107—103] was said.

The COURT.—I think the objection is good.

Mr. THATCHER.—(Q.) Did he at any time during that time say anything to the creditors there present, which in substance and effect, urged the creditors to consent to the contract?

Mr. WHEELER.—Same objection; leading and suggestive.

The COURT.—I will sustain the objection.

Mr. THATCHER.—(Q.) What, if anything, was said by Mr. Poole or Mr. Murrish, or Mr. Nenzel,

(Testimony of W. S. Bayless.)

or any of the other defendants present at that meeting asking the creditors to consent to the execution of this contract? A. Nothing.

Q. Did they or any of them, the defendants, at any time during that meeting, ask or request the creditors to consent to the signing of that agreement? A. No, sir.

Mr. THATCHER.—That is all.

Mr. WHEELER.—That is all. [108—104]

Cross-examination of Mr. DAVID TAYLOR Resumed.

Mr. WHEELER.—(Q.) Mr. Taylor, coming back to the meeting of Monday, the 31st day of March, 1919, in your office; at that meeting you say that certain figures were read off to you, and certain lines and figures were placed by you upon a map here offered in evidence in your behalf. I now hand you said map, the same being a part of Plaintiff's Exhibit 15, and ask you to point out to the Court just what lines upon that map were placed there on that occasion by you. I am talking about lines now, not about figures.

A. That dotted line from the bottom of the shaft below level number 4 to the farthest extension of the northeast level number 2; the line from that point leading directly up to the level number one; the line from that point leading back to the point of the farthest ink figure on the map of level number 2.

Mr. THATCHER.—(Q.) Level number 2 or level number 3?

(Testimony of David Taylor.)

A. Back to this point (indicating), level number 2; the line leading from the bottom of the shaft up to about the middle of the southwest station of level number 2; line leading from the surface on the southwest side down to the southwestern extension of level number 2; whether the extension of level number one was put in at that time or not, I can't tell; if it was pencilled, it was. I think the extension of level number one was put in at that time.

Mr. WHEELER.—(Q.) Have you now given us all of the lines that were put in at that time by you, while Mr. Poole was talking to you on Monday, the 31st day of March, 1919, as you say?

A. I am not sure, sir, I will tell you in just a minute. I think the extension of the upper tunnel from a point which shows the end of an ink line some hundred odd feet northeast, was put in at that time. With the exception of two lines showing from 60 or 70 feet somewhere on the southwestern side of level number 2, all of [109—105] these pencil lines were put in at that time.

Q. When was the last group of pencil lines referred to by you, which were not put in at that time, put in?

A. I think they were put in by me on receipt of a telegram from Mr. Nenzel on February 24th, 1919; the date is above there.

Q. Were the ore bodies computed in your presence by Mr. Poole on that occasion?

A. I don't think they were; Mr. Poole gave me

(Testimony of David Taylor.)

the figures; some of them he made figures, and some he did not.

Q. Did you figure anything at that time?

A. I don't think I did, sir; I might have figured some cubical contents of given areas.

Q. Just what do you claim was said to you about there being 60,000 tons of ore in sight?

A. The figures put down on these different blocks were given to me as the tonnage of commercial ore represented within these blocks at that time.

Q. Within what blocks?

A. Figures 42,728 represent the tonnage of commercial ore stated to me to exist between this line from the bottom of the shaft, to this point on level number 2, southwest, below level number 2, and within the northeast limit of level number 2, back to the bottom of the shaft.

Q. Now then, roughly speaking, or rather accurately speaking, ore within the angle formed by the two pencil lines drawn from the pencil line indicating the bottom of the shaft, was the area in which it was represented to you, you say, that there was 60,000 tons of ore? A. No, sir.

Q. Where?

A. I said 42,728, as represented to me there.

Q. What else or where else was other ore than that represented to you as being in the mine?

A. 9250 tons was represented to me as being in this block up here. [110—106]

Q. By "this block up here" you mean in the

(Testimony of David Taylor.)

extreme northeast portion of the map, indicated by the representation there of the surface line, as level number one extended?

A. The extreme southwestern.

Q. We will call it block "M." Block "M" was represented to you as containing some ore?

A. Yes, sir.

Q. The figures being there represented; and what was the other block?

A. There was a block "N" represented contained 4200 tons.

Q. Now turning to this portion in block "M," you understood that the line above the figure "M" indicated the surface of the ground, didn't you?

A. Yes, sir.

Q. You understood also that the line at the bottom represented level number one extended, didn't you? A. Yes, sir.

Q. And you knew, did you not, that it was not intended to be represented to you that there were any workings in that portion of the ground, other than there represented upon the map?

A. Not within the ground, not within that portion.

Q. And so you understood Mr. Poole as telling you that he knew definitely from the data upon this map that there was that amount of ore in that portion of the mine?

The COURT.—That is in "M"?

Mr. WHEELER.—In "M."

(Testimony of David Taylor.)

A. Yes, sir.

Q. And you supposed that it was possible for a man to know that definitely with workings no greater in extent than there represented on the map?

A. Mr. Poole stated to me that the entire surface outcrop averaged two per cent, from that point to that point, he stated that that averaged three-quarters of a per cent; he calculated or gave me the figures as being included within those limits. [111—107]

Q. You didn't understand that he could see into that ground any better than you could, did you?

A. No.

Q. Or that he knew any more of the contents of that ground, other than he surmised to exist there, other than such information that he had?

A. I presumed Mr. Poole understood from an engineering standpoint how to calculate ores within certain blocks.

Q. You knew what the data was upon which he made his estimate, didn't you?

A. I knew the data was on that map; whether he had any other estimate or not, I didn't know.

Q. You didn't suppose there were any holes in the ground, any shafts, levels, or anything else, other than shown on the map, did you? A. No.

Q. Now the same thing with regard to Exhibit "N"; did you suppose there were any other workings in the mine, any other development work than appeared there?

(Testimony of David Taylor.)

A. Not then appeared on the map, no, sir; with the exception of a stope in which it has been stated very good or rich ore had been taken out.

Q. Then with reference to "E," "D," and all of the rest within the triangle, which you say was represented to you as containing 42,728 tons of ore, did you suppose there were any other or different workings or development in the mine, than is there represented?

A. Not then as shown on the map, no sir.

Q. You believed that from such information as Mr. Poole had, that in stating to you, as you say he stated, that there was 60,000 tons of ore in sight, that he was giving you his best opinion?

A. I supposed he was stating the conditions of the mine.

Q. You didn't suppose, did you, that he had a knowledge as to what was in that block of ore, or that he could have any accurate knowledge from the data that you knew he then had, in view of the extent [112—108] of the development of the mine?

A. I supposed Mr. Poole knew what he was talking about when he made statements to me as an engineer.

Q. You supposed he could see into the ground, and knew under those conditions as to how much ore was in sight, did you? A. No.

Q. You supposed then, did you not, that you were merely getting his opinion, based upon such de-

(Testimony of David Taylor.)

velopment as then existed, as to how many tons would probably be there? A. Yes.

Q. And that was all you did expect to get from Mr. Poole on that point, wasn't it? A. Yes.

Q. Do you know the difference between fire assays and panning, and estimates based thereon, on so-called pan assays?

A. I don't know what you call a pan assay, no; I assume you mean panning?

Q. Ever hear the phrase pan assay?

A. Never before to-day.

Q. Never before to-day?

A. Never before you just used it, to the best of my knowledge.

Q. Did anybody ever tell you that any fire assays had been made in this mine, or of any of its ore, other than your own expert, Mr. Bancroft?

Mr. THATCHER.—I object as not cross-examination.

Mr. WHEELER.—I submit that all goes to the general knowledge of this witness.

The COURT.—I will allow the question. I suppose it goes to his knowledge of the condition of the mine?

Mr. WHEELER.—Exactly, and the basis of representations.

The COURT.—Do you wish to limit it to any date?

Mr. WHEELER.—(Q.) At any time before the 2d day of April, 1919, had any party to this action

(Testimony of David Taylor.)

ever told you that any fire assays had been made of the ore in this mine? [113—109]

A. I don't recollect ever having been told so.

Q. Did anybody ever tell you that any chemical analysis had been made of the ore in this mine?

A. I don't know whether they ever told me specifically so, no.

Q. Did anybody ever tell you of the pannings that had been made in the different levels or works? A. No.

Q. Nothing was ever said on that subject?

A. Nothing that I recollect specifically as to how the values would reach.

Q. Anything said about Ben Morron taking pannings in the mine?

Mr. THATCHER.—Is this confined prior to April 2d?

Mr. WHEELER.—Prior to April 2d.

A. I don't recollect that anything was ever told me to that effect.

Q. Do you know that it was the practice in the mine to pan and make estimates of the ore, from panning? A. I did not.

Q. You never heard that from any source?

A. I don't recollect it.

Q. Now just what, in addition to reading off these figures, did Mr. Poole say to you at the time you say this conversation took place on the 31st day of March, 1919?

A. He gave me the figures; I think there were

(Testimony of David Taylor.)

some figures also on the map, showing some widths and some other data, which you asked me about just now.

Q. Did he, as a matter of fact, express any opinion whatever to you? A. He did.

Q. What did he say?

A. He told me very positively that there was over 60,000 tons of ore developed in the mine, which would average over 1.75 per cent tungstic acid.

Q. That that was his opinion?

A. It was his statement.

Q. I asked you a moment ago if he ever told you what his opinion was? [114—110]

Mr. THATCHER.—Object on the ground it is incompetent, irrelative and immaterial, not cross-examination; that it does not call for, nor did any of the direct examination call for the question of Mr. Poole's opinion as to the mine. Mr. Taylor has testified as to what the conversations were; if counsel desires to ask as to conversations, that is a different proposition, but the question here is not one of opinion, but of conversations and representations.

Mr. WHEELER.—I am asking the question in such form that it calls for the answer as to whether or not the man said in substance that his opinion was so and so.

The COURT.—You may repeat any conversation you had which would indicate whether it was an opinion or a positive statement.

(Testimony of David Taylor.)

A. His statement was very positive it was over 60,000 tons.

The COURT.—That is your opinion, repeat now just what was said.

A. I could not repeat his exact words, your Honor.

Q. Give it as near as you can.

A. Well, I don't know that I can say anything further than that he stated, said there was, his words would have been these: "There are 60,000 tons of ore that will average over 1.75 per cent, developed in the mine." The opinion was expressed by all of them that that probably was not the maximum amount of ore, that additional ore could be expected, but that that was proven and developed at that time.

Mr. WHEELER.—(Q.) What did you understand him to mean when he said that ore was developed at that time?

A. I understood that he meant ore that was blocked out.

Q. What do you mean by blocked out?

A. Well, I should say was proven in the mine, that you could count on that tonnage of ore being there definitely.

Q. Was proven that it is probable or definite?
[115—111]

A. I should say blocked out would mean definite.

Q. So notwithstanding the map that was shown you, the extent of the workings, and such experi-

(Testimony of David Taylor.)

ence in mining matters as you had had up to that time, you understood that it was represented to you that 60,000 tons of ore was blocked out in that mine? A. Yes, sir.

Q. Were the words "blocked out" used?

A. It might have been developed.

Q. Was it represented to you on how many sides development had taken place; was anything said about that?

A. It seems to me the map shows how many sides those blocks were proven. I think that the statements in that connection were made to the effect that this block of ore, pointing to the map, is developed on four sides, this on three sides, and this on two sides, if anything of that kind was said.

Q. But you are not sure whether any thing was said or not on that subject?

A. As to the different sides on which ore bodies were developed, I mean.

Q. At any rate, you wish it understood that you implicitly believed from that moment forward that it was an assured fact, and not a mere matter of Mr. Poole's opinion, that that quantity of ore, to wit, 60,000 tons, of the assay value of an average of 1.75, was surely in that mine? A. Yes, sir.

Q. You believed that so implicitly that from the minute forward you stood ready to advance your own money, and pay it without any further examination of the property, didn't you?

(Testimony of David Taylor.)

A. I wasn't willing to advance it at that time, no.

Q. Why?

A. Because it wasn't necessary, time wasn't ripe yet for it; that was the 2d of April, this didn't call for putting up the money until the middle of June; I wanted to make further investigation into the tungsten market, also to see whether I could get [116—112] somebody else to put up or not.

Q. But you never dreamed of having any further investigation of that property made before you personally should put up a cent, did you?

A. It might have been considered.

Q. You say it might have been, was it?

A. I could not tell you.

Q. Would you at that moment, without any further investigation of that property, have put up any money whatever?

A. I made a distinct offer to Mr. Thane three or four weeks after that to put up \$75,000, right then and there, if he would put up the balance to go through with the deal.

Q. Without any investigation whatever?

A. Yes.

Q. You never contemplated then at any time having any other or further investigation made of that property, either before you put up any money or let anybody else put up any money?

A. Why, afterwards I did, because various people insisted on it.

(Testimony of David Taylor.)

Q. But so far as you were concerned there never was a doubt in your mind from that minute forward that there were precisely 60,000 tons of ore of that value developed in that mine?

A. I said that there was at least 60,000 tons developed, not precisely 60,000 tons.

(By direction the reporter reads the question.)

A. Not precisely 60,000 tons; there were more than 60,000 tons.

Q. How much more than 60,000 tons?

A. It was not stated.

Q. How much more did you believe were there at that time?

A. I didn't have any idea, or know—no, I change that; the original plan of development, there were certain proposed developments the statement was made, I think by Mr. Bancroft some time before, that if certain proposed developments, if certain proposed work should prove to be in ore, that there would be a large additional tonnage developed; my impression is that if all the work proposed [117—113] by him should have been in ore, there would have been some 150,000 to 160,000 tons blocked out.

Q. But from that moment forward the question did not enter your mind—your mind—but that there was at least 60,000 tons there?

A. No, it did not; I had implicit confidence in Mr. Poole's statement.

Q. You believed that implicitly; and from that

(Testimony of David Taylor.)

moment forward you were prepared to represent to any person whom you invited in that there were 60,000 tons of ore there?

A. I was prepared to, and did so.

Q. It didn't occur to you to try to represent that there was at least 25 or 30, or 35 or 40 thousand tons there, did it?

A. I represented on several occasions that there was at least forty to forty-three thousand, writing in explanation that there was additional, bringing it up to from sixty to seventy thousand tons.

Q. Did you ever plan to represent to anybody after you talked with Mr. Poole on this occasion that there were twenty-five to thirty-five thousand tons surely there? A. No, sir.

Q. Before the parties left Denver did you have any conversation with Mr. Murrish wherein you endeavored to persuade Mr. Murrish that if he acquiesced in the proposed agreement upon the terms finally agreed upon, that he would come out as well by the transaction as he had hoped to come out under the original option?

A. I think I explained that, tried to explain that, and show that to both Mr. Nenzel, Murrish and Mr. Poole.

Q. When?

A. When the terms were under discussion.

Q. When?

A. Whether that was the first day or second or third day, I don't know. I think that was the basis on which the contract was made. [118—114]

(Testimony of David Taylor.)

Q. Yes, it was done after Mr. Murrish had demurred about going into the contract, wasn't it?

A. I think it was made before the contract was agreed, when I was trying to explain to them this seemed a fair proposition, and why it seemed fair to me.

Q. Search your memory and tell me on what date you used those arguments.

A. I could not tell you exactly.

Q. Was it on Monday, the 31st, or on Sunday, the 30th, perhaps? A. I could not tell you, sir.

Q. Did you make any figures or draft any prospectus at that time which you exhibited to Mr. Murrish, and if so have you it?

A. I didn't draft any prospectus at that time; I drafted several prospectuses before then.

Q. Did you at that time draft one in which you endeavored to persuade Mr. Murrish to come in on the transaction?

A. I don't think so; I don't think I did; I may have arranged the prospectus that I had previously drafted.

Q. You say a prospectus which you had previously drafted; have you that?

A. No, sir, I don't think I have; I am not sure whether the prospectus had been previously drafted or not; I drafted several prospectuses during this general period.

Q. Was the prospectus referred to by you in type-writing? A. Yes.

(Testimony of David Taylor.)

Q. Did you draft any other prospectus or make any figures during this transaction, and exhibit the same to Mr. Murrish for the purpose of persuading him to come in and sign the contract, showing him that he would profit by it?

A. That he would profit by it over and above the others?

Q. No.

A. I think I made various figures, worked out the business results, and probable results for all of it.

Q. Oh, you did? Now in working out those probable results, how [119—115] did you treat this item of 60,000 tons of ore in sight?

A. It was figured out as showing the results to be gained from mining that 60,000 tons with the costs as given in Mr. Bancroft's report, and with the possible or probable market price of the resultant product.

Q. And accepting the statement that there were 60,000 tons, you used that statement in trying to persuade Mr. Murrish, did you?

A. I don't think I did, sir.

Q. Did you use the 60,000 tons in any way as a basis for figures which you presented to Mr. Murrish? A. I could not tell you, sir.

Q. Search your memory, please. As a matter of fact, you tried to figure out with Mr. Murrish what profit there would be in the mine if he accepted your proposition, did you not, and what profit therefore, would come to him as a stockholder?

(Testimony of David Taylor.)

A. My impression is now that I did give some such figures, and make some such figures, to show the profit or possible tonnage which would have been developed along the lines of the Bancroft development program, which involved some hundred and fifty to one hundred and sixty thousand tons.

Q. So that instead of using the 60,000 tons; you then used the higher development of 160,000?

A. I think I did, I am not absolutely sure of that.

Q. But you of course at no time used the figures of 25,000 or 30,000 or 35,000, either with Mr. Murrish or with anybody else, did you?

A. I am very sure I didn't, sir.

Q. Examine the document which I now hand you, consisting of page one, and on the back of it page 2, and the third page unnumbered, and state whether or not the words and figures are your handwriting?

A. Yes, sir, that is my handwriting.

Q. And the figures are yours?

A. They appear to be, sir. [120—116]

Q. When and where did you make those figures?

A. I do not know, sir; I should presume that they were probably made in my office during these conferences.

Q. Can you not state what use you made of them on that occasion?

A. I cannot, sir; I have completely forgotten any such figures.

Q. Exactly. I call your attention to the figures and words as follows—

(Testimony of David Taylor.)

Mr. THATCHER.—I would like to have the instrument in evidence.

Mr. WHEELER.—Certainly, in it goes. Mark it out Exhibit “B.” Perhaps the pages had better be called “B-1” and “B-2.”

(Document consisting of three pages, is marked Defendant’s Exhibit “B.”)

Mr. WHEELER.—(Q.) I call your attention to the following paragraph appearing on pencil page 2 of Exhibit “B”: “In order to make investment safe only necessary to show at 8.00 market 35400 tons of ore, 10.00 market 25,500 tons of ore.” I ask you if you recall writing that statement?

Mr. THATCHER.—I object on the ground the instrument itself is the best evidence, if it is competent. It appears there, and he testified that he made it.

The COURT.—He can be asked if he recollects that.

A. I don’t specifically recollect making that statement, but it is my handwriting.

Mr. WHEELER.—(Q.) After examining that document, do you still say that on that occasion you believed implicitly that there were 60,000 tons of ore in that mine, as a matter of fact and not as a mere matter of Mr. Poole’s estimate?

A. I do, sir.

Q. Same explanation with reference to this I am going to ask you for, and see if it will recall your recollection; I call your attention to page one:

(Testimony of David Taylor.)

“Incorporation 1,500,000.” Do you remember anything about that? [121—117]

A. I remember nothing whatever of the details of this, sir, except that it is all in my handwriting.

Q. And you don't remember when you wrote it, you don't remember where you wrote it, you don't remember what use you made of it, you don't remember whether you presented it to Mr. Murrish or not?

A. I don't remember when it was presented to Mr. Murrish. I do remember what use I made of similar figures to other people.

Q. Do you remember what use you made of this on that occasion to Mr. Murrish, Mr. Poole, or Mr. Nenzel, or to any or all of those gentlemen?

A. I don't specifically; I should say it was used to explain the different results to be arrived at on different markets of tungsten, on different tonnages of ore.

Q. And why Mr. Murrish would profit by the transaction, would you say that also, would that be the purpose?

A. No, I should say that it was probably—there was no proposition ever made by which Mr. Murrish should profit in any way any more than any of the others.

Q. I didn't say that; I say he should profit as a stockholder if he undertook this arrangement.

A. I should say that it is probable.

Q. But as a matter of fact you can't recall it,

(Testimony of David Taylor.)

you don't remember using it, and you don't remember writing it?

A. I remember in a general way making a lot of figures, showing different results, before our contract was made, and on different plans; I do not remember that specific paper.

Q. You don't remember on what day it was used?

A. No, sir.

Q. You don't remember whether you used it April 2d, just before the contract was signed; you don't remember whether you used it April 1st, the day before the contract was signed, March 30th, [122—118] March 31st, or at all, do you?

A. I do not, sir.

Q. If it was so used the whole matter has gone entirely from your mind?

A. It has, sir. If I were allowed to read that and study it thoroughly I might be able to say.

Q. I think if you can give us any definite information on that you are entitled to have it. (Hands paper to witness.)

A. I think I know what that was, sir, now.

Q. Give your explanation, please.

A. I think that was some figures, general estimates of results and proposed method of financing, on which the new contract was bases; there was some changes later made; the question of twenty-five or thirty-five thousand tons is preceded by this statement: "In order to make investment safe it is only necessary to show at eight dollar market 35,000 tons in mine, at ten dollar market, 25,500

(Testimony of David Taylor.)

tons.” There are a number of figures showing the basis of calculations.

Q. And the profits that would come upon those tonnages of ore?

A. Yes, the profits probably—

Q. To the stockholders; and those tonnages or ore, are not those figures designed for that purpose, didn't you—

A. (Intg.) Probably I did, as I should have been one of the stockholders.

Q. Now then, that you have seen it and examined it and recall that the figures were made by you in order to show the stockholders they would profit upon a basis of 25,000 or 35,000 tons, can you tell us just how you made use of this in connection with the negotiations or transactions on any of these days in Denver in March and April, 1919?

A. No, sir, except in the general way of discussing the business result. [123—119]

Q. Now it has been recalled to you, have you any clear or definite recollection as to whom you presented it, to whom you read it, and what was said on the subject?

A. Nothing absolutely clear and definite.

Q. Have you any recollection whatever, if you have none clear or definite?

A. I have a general recollection of discussing with Mr. Nenzel, Mr. Murrish and Mr. Poole the general situation, figures and results that appear to be given in that statement.

Q. And that was the basis upon which you

(Testimony of David Taylor.)

thought you would attempt to finance it, wasn't it?

A. It was the proposed basis, yes.

Q. And on that basis you were going to represent, were you not, that if there were 35,000 tons of ore on a certain basis, eight dollars; and 25,000 tons on a ten-dollar basis, that the advance of the money to pay the creditors would be safe?

A. Yes, sir.

Q. And also that the stockholders in the corporation, upon that basis would receive more than they would receive under the former contract, more than fifty cents per share, in other words?

A. I think that was on the basis of a hundred and fifty-seven or a hundred and sixty thousand tons in the mine.

Q. Then if you think that see if I can't correct you. Kindly examine the figures on page one, headed "Net profit to present owners"; do you recall those figures, and making them?

A. I don't recall them specifically, no, sir.

Q. But it is all in your handwriting?

A. All in my handwriting, yes, sir.

Mr. WHEELER.—It may all be considered read, I think.

Mr. THATCHER.—Yes.

Mr. WHEELER.—(Q.) Before this contract was signed, or rather, did you agree upon the terms tentatively on Monday, the 31st day of March, 1919? [124—120] A. No, we did not.

Q. But it was on that day you are very sure that you placed the figures and the lines upon the map

(Testimony of David Taylor.)

annexed to exhibit 15? A. Yes, sir.

Q. Did you meet again on that day, Monday?

A. I think we probably did; my remembrance is we met every morning and afternoon, and most of the evenings.

Q. Have you any recollection of what was said on any other occasion, on Monday, the 31st day of March?

A. Not specifically what was said at different times.

Q. Were any terms agreed upon by any person on that day, Monday the 31st?

A. Whether they were or not I am not absolutely sure; the terms were agreed upon as far as Mr. Nenzel and Mr. Poole were concerned, on a Tuesday evening, the day preceding the—Wednesday, I think it was, the day the contract was signed; at any rate, preceding the day on which the contract was to be drawn and signed. I went to Mr. Poole and Mr. Nenzel's room at the Brown Palace Hotel; my recollection is that we agreed to the terms at that time; that is, Mr. Nenzel and Mr. Poole did.

Q. By the terms you mean the terms as now set forth in Exhibit "C" attached to your complaint?

A. My impression is that the agreement at that time was sixty-five and thirty-five per cent, or some slight variation.

Q. Otherwise the terms were the same as were subsequently embodied in Exhibit "C"?

A. They were not the terms that were subsequently embodied; they were—

(Testimony of David Taylor.)

Q. (Intg.) Then Exhibit "C" was not agreed upon on the 31st day of March, in the evening, by Mr. Nenzel and Mr. Poole, was it?

A. The terms by which I got a little more than I did in the final contract were agreed to by Mr. Nenzel and Mr. Poole that evening; Mr. Murrish did not agree and the terms were changed the next morning to suit Mr. Murrish. [125—121]

Q. The next morning, April 2d, to suit Mr. Murrish? A. Yes.

Q. Did you have any conversation with Mr. Murrish on the evening of the 31st?

A. The 31st, that was Tuesday evening?

Q. Yes.

A. The evening before the contract was signed?

Q. Yes.

A. I had a conversation with Mr. Nenzel, Mr. Poole and Mr. Murrish in their room; I am not sure whether I had any conversation alone with Mr. Murrish or not.

Q. You now say that the terms were agreed to by some of those parties; were any of the terms subsequently embodied in the contract Exhibit "C," agreed to that night?

A. I think all the terms were agreed to that night, with the exception of the percentages.

Q. Also agreed to by Mr. Murrish that night?

A. With the exception of the percentages, I think they were. Mr. Murrish left, and I remember the statement made by Mr. Poole to Mr. Nenzel that Mr. Murrish would be all right the next morning,

(Testimony of David Taylor.)

and he would agree to it, and we need not worry.

Q. The next morning where did you meet?

A. In my office.

Q. What was said? All parties were present, I assume? A. Yes.

Q. Mr. Murrish, Mr. Nenzel and Mr. Poole?

A. Yes.

Q. What was said?

A. Why, in effect it was agreed that a contract should be drawn; I think I told Mr. Murrish that I would agree to take 62 per cent instead of 63 or 64 or 65; whatever it had been the night before.

Q. Did you then make any figures?

A. What sort of figures?

Q. Any figures on the profit that would come to Mr. Murrish if he accepted the matter on that basis?

A. I don't remember, sir, whether I did or not.

(A short recess is taken at this time.) [126—122]

Q. You had planned, had you not, while these gentlemen were still in Denver to go and visit the property? A. Yes.

Q. You had intended to visit the property before going to New York to attempt to make your flotation or obtain the money, had you not? A. I had.

Q. You expected to go to the property earlier than you did get there, didn't you?

A. I don't remember exactly.

Q. You had hoped that Mr. Bancroft would be able to be there in the course of a few days after the contract was made, had you not?

(Testimony of David Taylor.)

A. I don't remember, I don't think so; my impression is that Mr. Bancroft was engaged in another examination somewhere in Mexico or South America, or somewhere.

Q. One of the exhibits offered in evidence says he will be gone until April 10th, and you hoped he would be able to stop over on the way; do you recall that? A. I don't recall that specifically; no, sir.

Q. The first ten days in April?

A. I don't recall that specifically.

Q. It was your desire, however, from the beginning to have Mr. Bancroft look at the property again, wasn't it?

A. No specific desire; no, sir.

Q. It was not, you say?

A. No specific desire, no.

Q. It was your desire, however, wasn't it?

A. No specific desire; no, sir.

Q. I say it was a desire, however, was it not, on your part to have him look at the property, and you tried to get him to look at it before he went down to Mexico, didn't you?

A. I think I asked him whether he could meet me at Lovelock, as Mr. Friedman suggested; I may have telegraphed or written him and asked him if he could be there; I am not sure whether I did or not. [127—123]

Q. You did try to get him to stop over there on his way, before going to Mexico, to look at the property again, didn't you?

A. I may have tried to get him to stop over, not

(Testimony of David Taylor.)

specifically to look at the property, to stop over for a conference, as suggested by Mr. Friedman.

Q. Did you not after the 2d day of April endeavor to get Mr. Bancroft before he should start for Mexico, to go out and look at that property?

A. I do not remember, sir.

Q. You have no recollection on the subject?

A. No, sir.

Q. What, if anything, did you do intermediate to the time of your going to this property, and the 2d day of April, in the way of attempting to secure money with which to carry out the transaction?

A. I talked to Mr. F. M. Taylor and Mr. Brown, and several other people in Denver about it; I wrote some letters, one letter that I specifically remember, to the Crucible Steel Company, which was one of the largest consumers of tungsten, outlining the general proposition, and asking if they cared to go into it in some way.

Q. What was your occupation in the month of April, 1919?

A. My occupation during all this time has been buying and selling ores.

Q. Were you an officer of any corporation engaged in the business? A. I was.

Q. Was that an active concern, or a moribund concern? A. Practically dead at that time.

Q. Was it doing any business at all in the month of April, 1919?

A. It may have been doing some, it was doing very little.

(Testimony of David Taylor.)

Q. Were you doing any business for it?

A. Yes, all the business that was done by it was being done by me for it. [128—124]

Q. Really that was the name under which you were transacting business, wasn't it; the corporation was one in which you owned 95 per cent of the stock, wasn't it?

A. Yes, it was a corporation under which I was doing certain business; I was doing other business too.

Q. What other business were you engaged in during that month of April?

A. One thing I was trying to raise money for this tungsten proposition.

Q. What else?

A. I was also engaged in negotiating for the purchase of radium and vanadium plant in Denver.

Q. Was that a thing that took any time?

A. Yes.

Q. How much time did you devote to that in the month of April?

A. I don't know exactly; I had a number of conferences with different people about it.

Q. Did you spend any number of days at it?

A. That, and all the business that came in during that time, I could not tell you how much time I spent at one business and how much at another; the chief occupation at that time was trying to finance this tungsten mine.

Q. Now let us see, this is in the month of April before you had visited the property, and after the

(Testimony of David Taylor.)

2d day of April, just how many hours did you put in in that period of time, in trying to finance this transaction? A. I don't know, sir.

Q. You have told us what you did; how long did it take you to write the letters which you have told about?

A. I don't know exactly how long it took; I know it was a letter that was very thoughtful, that I tried to think out and work out before I wrote it, as I would any such letter.

Q. How many minutes or hours were taken up in the conversations that you had in that period of time? A. I don't know, sir. [129—125]

Q. What say? A. I don't know, sir.

Q. Give us an estimate, an accurate estimate, can't you?

A. I could not give you an accurate estimate at all; I was in my office during business hours practically all the time; how much time I spent on one thing and how much on another, I could not tell you; the chief thing I was working on during this time was this tungsten.

Q. Give us the length of the conversations which you had with the parties whom you say you approached? A. I could not give you the length.

Q. You have told us what you did in the period of time before you went out to visit the mine, haven't you?

A. I don't know whether I have or not.

Q. Very well. When you went out to visit the mine did you go into it? A. I did.

(Testimony of David Taylor.)

Q. Please describe just what you did in regard to the mine; did you go down the main shaft?

A. Yes.

Q. To the bottom?

A. Eventually I think I went to the bottom.

Q. Eventually to the bottom. Anyhow, beginning at the top, did you examine the surface?

A. We went down the mine first, and went through all the workings, so far as I know.

Q. Went through all the workings; who went with you?

A. Mr. Poole, and I think Mr. Morrin was with us all the time, I am not sure.

Q. Did you look at what was there presented in the mine? A. Yes.

Q. Did you ever see any tungsten ore before that time? A. I have seen various specimens.

Q. What was your purpose in going into that mine, anyhow? [130—126]

A. My purpose in going into the mine and visiting the mill was to be able to say to people to whom I talked in the East that I had seen the property, that I knew there was a mine there, and knew there was a mill there, and that it was a going concern, and look over the whole proposition from a general business standpoint.

Q. In other words, to back with your own impressions the representations which you proposed to make to them?

A. From a business standpoint, yes, sir.

Q. Did you take any samples at all?

(Testimony of David Taylor.)

A. No, sir.

Q. Did you take any specimens at all?

A. I may have taken one or two specimens, I don't know.

Q. Was any panning done in the mine while you were there? A. I don't remember any.

Q. Think about it, and then tell me?

A. I don't remember any.

Q. How much time did you spend in the mine?

A. I should say about three hours.

Q. So far as you know and now believe, you examined every part of the underground workings, didn't you?

A. I would not say I examined them, I went through them.

Q. Went through them for the purpose of looking at them, didn't you? A. Yes.

Q. Was anything said about the ore in the faces, as you examined them did you look at that?

A. Yes, I looked at every place they told me was ore; if they said this was ore, I looked at it.

Q. Did it look like ore to you?

A. I would not know whether it was ore or not.

Q. So then, you went on to New York directly, did you?

A. I went to Lovelock first, and then I went from there to New York. [131—127]

Q. Not stopping at Denver on the way?

A. No, sir.

Q. Now this trip that you took to New York of course was one that was based on your contract,

(Testimony of David Taylor.)

and solely for the purpose of trying to put the contract through, wasn't it? A. Yes, sir.

Q. And otherwise you would not have planned to go to New York except for this precise business of this contract?

A. I don't think at that time I would have.

Q. As a matter of fact isn't it true that before you ever made this contract you had planned definitely to go to New York in the latter part of April, and that your trip to New York was pursuant to that plan?

A. I don't think it was, no, sir. I had some interests in New York, Pennsylvania, and I had to go to New York very frequently. I should like to correct that statement, if I may. At that time there was two or three shipments, I have forgotten just the quantity, of scheelite concentrates, which I had from this mine, and on it I had advanced money, and which I was obligated to sell under the contract; the ore contract; at that time I think none of it had been sold, and I had been unable to sell some; and it is quite possible I planned to go to New York at that time, and go East in an endeavor to sell these concentrates.

Q. I call your attention to the following passage in Plaintiff's Exhibit 12, purporting to be a letter written by you to Mr. Friedman, dated March 25th, seven days before this contract, Exhibit "C," was made: "While in New York I found the president of one of the strongest banks quite interested in the general proposition and I believe that on some

(Testimony of David Taylor.)

modified form of option I could induce him to go ahead when I go East again, which will be the latter part of April." Do you recall that statement? A. Not specifically, no, sir. [132—128]

Q. Well, is it not the fact that regardless of this particular option, you intended to go to New York in the latter part of April, and that in truth you went there pursuant to that intent formed as early as March 25th, and not because of this contract dated April 2d? A. No, sir, it is not true.

Q. Then why did you make that statement in your letter?

A. I don't remember why that was made at that time; it was undoubtedly an expectation at that time to go East for some purpose.

Q. As a matter of fact at that time you did have business which you thought would require attention in New York the latter part of April; this is on March 25th you thought it?

A. I probably did if I wrote that letter.

Q. And what business was it?

A. The only business I remember of now was the general promotion of this mine and the sale of tungsten concentrates.

Q. As a matter of fact when you went to New York the latter part of April, you proceeded to sell those concentrates, or to negotiate with regard to them, didn't you?

A. I think they were all sold before I got East.

Q. You had something to do with the proposition

(Testimony of David Taylor.)

of selling concentrates while you were in New York, didn't you? A. Yes.

Q. And that was a part of the business that took you there, wasn't it?

A. I don't know whether it was specifically or not.

A. Well was it? A. I told you I don't know.

Q. At any rate when you got there you did transact business of that character, didn't you?

A. I tried to sell tungsten concentrates whenever I was in New York; it has been one of my businesses for many years.

Q. As a matter of fact, when you got there on that occasion you [133—129] did transact business of that character, selling concentrates?

A. I don't know whether I sold any concentrates at that time or not; I certainly tried to.

Q. Did you negotiate while in New York for the sale of concentrates or attempt to make arrangements for sales of that character?

A. I did whenever I was in New York.

Q. Will you say that was not the reason for your going to New York?

A. I will say I don't think it was specifically.

Q. In other words, wasn't that the business that took you there, and didn't the matter of this contract come in as an incident to that business, rather than the business of the contract take you there and the business of the concentrates come in as an incident? A. No, sir.

(Testimony of David Taylor.)

Q. So notwithstanding the fact that on March 25th you said you were going to New York the latter part of April, you now say the contract of April 2d was what took you there, and not this business outlined in your letter of March 25th?

A. I say they all might have been part of taking me there.

Q. Now when you got to New York did anybody there subscribe any real money?

A. Several people there agreed to take some.

Q. Did anybody subscribe any real money, which entered into any part or portion of the alleged money that you say you had afterwards ready to complete this transaction with? A. They did.

Q. How much money came into your hands in New York on that occasion? A. None.

Q. How much money was subscribed at any time by any person to go into this venture, not to loan you but to go into this venture?

A. Twenty-five thousand dollars.

Q. By whom? A. By Mr. Thane.

Q. Mr. Thane then agreed while you were in New York unconditionally [134—130] to go into this venture, did he?

A. No, sir. Mr. Thane insisted that the property be examined by Mr. Bancroft again.

Q. So then you had no unconditional subscription for \$25,000 from Mr. Thane, but it was on condition that Mr. Bancroft should first examine the property, was it? A. Yes.

(Testimony of David Taylor.)

Q. Did Mr. Thane ever put up any real money in your hands? A. No.

Q. Did that \$25,000 form part or portion of the money which you said you had available in the course of your direct examination? A. It did not.

Q. So then that was not a subscription that you used in any manner in making your alleged offer of performance, was it?

A. I was counting on that subscription, but I had enough money on hand to take care of that in case it didn't come. Mr. Thane was in New York on some other business, and telegraphed me the money would be available as soon as he got back to San Francisco, that he could not arrange it from New York; he told me he had had some talk with Mr. Poole, and that Mr. Poole had arranged that his associates would postpone payment of that \$25,000, if necessary; I did not rely on any payments being postponed on account of the creditors involved, and I arranged before leaving Denver to supply myself with the \$25,000 to make up Mr. Thane's payment, if it was not ready on time.

Q. I will come to that. While in New York all that was said by Mr. Thane was if Mr. Bancroft would examine the property and report favorably on it, that he then would come in for \$25,000; was that all of it?

A. Yes, that is all Mr. Thane agreed to do about subscriptions.

Q. And was it agreed at that time that Mr. Bancroft should examine [135—131] the property?

(Testimony of David Taylor.)

A. It was not.

Q. When was it first agreed that Mr. Bancroft should examine the property, at what date?

A. I cannot give you that exact date, about the 12th or 13th of May, when Mr. Thane telegraphed Mr. Bancroft and asked him to make the examination.

Q. That was while you were still in New York?

A. Yes.

Q. Then as early as the 12th or 13th day of May you had agreed that this examination should be made, is that right? A. Yes.

Q. And that you would pay for that?

A. Yes.

Q. And you did pay for it? A. I did.

Q. And it was an examination to be made for you? A. Yes.

Q. And the report to be made to you? A. Yes.

Q. And that was something that you arranged for, not in any way to satisfy yourself before advancing any moneys, because you were already satisfied, is that right?

A. I was satisfied, yes, when I went East.

Q. So that you were all ready to advance your money and carry the deal through, whether Mr. Thane came in or not, without any report from Mr. Bancroft?

A. Not after Mr. Bancroft had been engaged to make the report; naturally I wanted to see his results.

Q. No, but up to that moment?

(Testimony of David Taylor.)

A. Up to that moment, I should think.

Q. From the moment you engaged Mr. Bancroft to make the report you were not ready to come in on this proposition without further investigation, is that not true?

A. Naturally when I engage a man to make a report I want to see the result of his report.

Q. Exactly. Now up to that time what subscriptions had you obtained from any person or persons? [136—132]

A. I had obtained a subscription from Mr. F. M. Taylor for \$25,000, from Mr. D. R. C. Brown for either five or ten thousand, I am not sure whether the exact amount had been agreed upon before I left Denver or not.

Q. The first amount had not been paid in then before you left Denver, had it? A. It had not.

Q. So really nothing was paid in by any person until after your return from Denver, was it?

A. No, sir.

Q. And your return from Denver was not until after you had changed your mind, and come to the conclusion you must have Mr. Bancroft's report before going ahead, is not that so? A. Yes, sir.

Q. Mr. Brown had neither paid in five or ten thousand dollars then or at any time, had he?

A. He had not.

Q. So that all of the services that you claim to have performed and all of the expenses that you went to in this matter subsequent to the 12th or 13th day of May, were after you had determined

(Testimony of David Taylor.)

to have the representations which you say were made, verified by a report from Mr. Bancroft?

A. Yes, I am not sure whether it was the 12th or 13th day of May, or not.

Q. Not sure what?

A. Whether it was exactly the 12th or 13th of May that the arrangements with Mr. Bancroft was made.

Q. Is it not a fact that apart from this conversation that you have testified to about Mr. Thane and what he said he was willing to do, conditioned upon Mr. Bancroft's report, that you did not succeed in New York in getting anybody to come into the transaction?

A. That is not exactly true, no.

Q. Anything in New York, I said.

A. I got several people in New York who said they would probably [137—133] come in and take the preferred stock after the corporation had been formed according to the plans outlined.

Q. That was all that was said by them?

A. That was the only definite agreement or promise made to me.

Q. Is it not the fact that you tried to float this matter in New York, but that the people whom you dealt with demanded the control of the corporation before they would come in at all for any money, and so for that reason the whole matter fell through?

A. No, sir; that was the condition made by one person to whom I talked.

(Testimony of David Taylor.)

Q. Only one?

A. As far as I remember now, yes; the others were people whom I knew.

Q. I hand you a letter dated the 20th day of May, 1919, addressed to Mr. R. Nenzel, Secretary Nevada Humboldt Tungsten Mines Company, Lovelock, Nevada, signed David Taylor; is that your signature and did you send that letter to Mr. Nenzel? A. Yes, sir.

Mr. WHEELER.—We offer the letter in evidence, and ask that it be marked Defendants' Exhibit "C."

Mr. THATCHER.—No objection.

Mr. WHEELER.—Considered read.

(The letter dated May 20th, 1919, is marked Defendants' Exhibit "C.")

Q. Calling your attention to Defendants' Exhibit "C" to the following phrase: "Nobody in the east wanted to tackle the proposition unless they had control, and we were unwilling to give that up." Do you recall making that statement?

A. I do not particularly recall it, but if it is in the letter, I made it.

Q. Was it true or false? A. I don't know, sir.

Q. What was done with the \$25,000 which you say your father advanced? [138—134]

A. It was put in the bank.

Q. Where? A. New York Trust Company.

Q. By whom?

A. As I remember it was mailed to them by me for deposit.

(Testimony of David Taylor.)

Q. In whose name was the \$25,000 deposited?

A. In my own name.

Q. In your general account?

A. I have only one account there.

Q. And it was paid to that account in your name?

A. It was.

Q. On what day was it deposited?

A. I don't know, sir.

Mr. THATCHER.—Do you want a memorandum?

Mr. WHEELER.—If it will help you to give us the date?

(Witness examines paper.)

A. It was received by the New York Trust Company on May 31st.

Q. On May 31st. When did you father pay that to you?

A. It was paid within one or two days before it was mailed from Denver; I don't remember the exact date it was mailed.

Q. What became of that deposit; was it used by you for any purpose at any time, if so, when and what purpose?

A. It was not used by me.

Q. What did you do with it?

A. Gave it back to him.

Q. When did you give it back to your father?

A. I don't remember exactly; presumably not till after I went East, after these negotiations in San Francisco.

Q. You say presumably, do you know definitely?

(Testimony of David Taylor.)

A. No, I do not.

Q. By the way, it was along in June, about June 4th, that you left San Francisco, wasn't it, to go East?

A. I can tell you the exact date by referring to the diary.

Q. Consult it. (Witness examines diary.) [139—135]

A. I left San Francisco June 10th.

Q. Then you cannot tell us whether before leaving San Francisco on June 10th you had returned that \$25,000 to your father, can you?

A. I am very sure I didn't do it before I left San Francisco.

Q. That you did not before leaving San Francisco, or that you did?

A. That I did not before leaving San Francisco.

Q. Then how soon after returning to San Francisco did you return it to him, if you know?

A. I do not know.

Q. Have you nothing in your memorandum from which you can tell us or have you no other data by which you can tell us when you returned that money to your father?

A. The only way I could tell is by consulting my check-book, when I gave him a check for it.

Q. Have you your check-book here, or the stubs?

A. I have not.

Q. When your father gave you that money was anything said as to the terms under which he gave it to you?

(Testimony of David Taylor.)

A. It was originally given me on the basis of my presentation of the facts to him; when I left Denver after we had Mr. Bancroft's report, he told me that I could use that subscription if I chose to, if some modified form of option or arrangement were made, or went into some new arrangement myself.

Q. And that was the time that he handed you the money, wasn't it?

A. No, sir, the money was given me, as I remember, before we got Mr. Bancroft's report; whether the actual check was given me at that time, I am not absolutely sure.

Q. On what date did you get Mr. Bancroft's report?

A. I got Mr. Bancroft's report after arrival in San Francisco.

Q. When did you get Mr. Bancroft's report on the assays of the mine?

A. Do you mean the memoranda giving the assays or Mr. Bancroft's formal report? [140—136]

Q. I mean a memoranda giving the assays.

A. The day before I left Denver.

Q. What day did you leave Denver?

A. May 29th.

Q. And you had made that deposit in New York on the 31st of May?

A. A check was received in New York according to the New York Trust Company's statement on that date.

Q. On the 31st day of May? A. Yes.

Q. Had you received by telephone or wire any

(Testimony of David Taylor.)

information as to what the assays were prior to the date that you have just given us?

A. Yes, we received them on May 27th, the first batch on May 27th, and the second on May 28th.

Q. Did you communicate them to your father?

A. Yes.

Q. So your father after seeing the assays gave you this check, which you sent on to deposit in New York, did he?

A. I should say from these dates he could not have; the check was received in New York for deposit May 31st.

Q. You believe you sent it on immediately, do you not?

A. I don't remember just when I sent it on, presumably I sent it on as soon as I got it.

Q. Can you tell us whether your father had placed that money in your hands before or after you received the information as to what Mr. Bancroft's assays showed?

A. I am just trying to give you the dates, I cannot tell you exactly.

Q. Answer the last question.

A. I cannot tell you exactly, no.

Q. You cannot. Have you any recollection on the subject?

A. No except it was given within a few days at that time.

Q. But at the time it was given, if I understand you, your father said there would have to be a

(Testimony of David Taylor.)

modified form of option, and that you were to use it under those conditions?

A. I could not tell you, if the money was given me after Mr. Bancroft's report came in, but as I remember, my father advised me [141—137] not to go on with the deal.

Q. And let you use his money only under the condition, or instructed you to use his money only under the condition that a modification of the option was effected?

A. That was his judgment or advice; the money was mine to use as I saw fit.

Q. Even so, it was a general loan to you, was it, without any provision whatever as to what your father was to receive for it, other than to get his money back? I understood the contrary on your direct examination. A. It was not.

Q. Well, then, what was it?

A. It was a subscription for 25,000 shares of preferred stock in this company, to be accompanied by a certain amount of bonus of common stock.

Q. What did you mean a moment ago when you said the money was yours to do with as you pleased, and you now say, I understand, that it was to be used for a specific purpose; which is true?

A. I say the money was mine to be used as I pleased; I mean it was to be used for the purposes of this deal in any way in which I would put my own money in.

Q. I further understood you a moment ago that

(Testimony of David Taylor.)

you were only to use it in the event a modification of the option was obtained; is that not what you testified to?

A. At the time we left Denver that is the only basis in which I intended to go into the mine.

Q. As a matter of fact then is this not about it: That there was to be a modified form of option, and that your father was to obtain preferred stock to the amount of \$25,000 and you were to give him a bonus in consideration of that \$25,000 of a share and a half for one, payable out of what you might receive in the shape of this 62 [142—138] per cent?

A. That was the basis of the original agreement to put in \$25,000, yes, sir.

Q. Was that not the basis upon which he finally handed you the money?

A. If the money was given me before Mr. Bancroft's report came in that must have been the basis of it.

Q. But you can't tell us then even now, whether it was before or after, and what the precise terms were under which your father finally advanced you the cash, is that so?

A. If you will give me a moment to consult my diary I can tell you the date on which it was received, probably.

Q. Very well, we will leave that. Was nothing said about the par value of the shares, and the number of shares, and the capital stock of the

(Testimony of David Taylor.)

corporation, and how many shares of preferred stock were to be issued?

A. Yes, that was all taken care of in the form of prospectus.

Q. A prospectus issued by you after your father handed you the money?

A. No, the prospectus was drawn up by Mr. Thane and myself before I reached New York.

Q. Did you use that prospectus with your father when he handed you the money, and did he say that he would agree—when your father handed you the money did that prospectus come into play at all?

A. Whether it did specifically or not, I can't say; I discussed the prospectus with my father a number of times.

Q. Were the number of shares in the proposed corporation, or whether a new corporation was to be organized, or whether the old corporation was to issue preferred stock, were those terms discussed with your father?

A. They were all left subject to the opinion of Mr. Jackson; that was one of the things Mr. Jackson was taken out to decide upon; whether a new corporation should properly be formed, whether there should be a new one, or whether the old company should [143—139] be amended so that preferred stock could be issued, or how that was to be handled.

Q. So you will not be misled, I am trying to find out from you just how complete and certain

(Testimony of David Taylor.)

was the agreement which you made with your father?

A. I think it was tentatively agreed upon, subject to Mr. Jackson's approval of the conditions at the time.

Q. Was the capitalization mentioned, whether one million, two million, five million, or any other number?

A. I think it was, yes, sir.

Q. What did your father agree to as to the amount of the capitalization?

A. It wasn't definitely agreed upon.

Q. So there was one thing left indefinite with your father and entirely subject to Mr. Jackson's recommendation to be subsequently made, is that right? A. Yes.

Q. What were to be the number of shares of preferred stock to be issued?

A. The proposal as suggested by all of us, and which was to be carried through unless Mr. Jackson advised otherwise, was the issuance of 150,000 shares of preferred—I think the arrangement, the provision, was for 200,000 shares of preferred, of which sufficient was to be issued to take care of the debts, the remainder to be left in the treasury; I think there was to be a million shares, or a million dollars capital of common stock, whether that would be one dollar shares or hundred dollar shares I don't know.

Q. So then it was not definite as to whether

(Testimony of David Taylor.)

shares would be one dollar shares or one hundred dollar shares?

A. I don't think it was, no, sir.

Q. Nor as to the number of shares to be issued?

A. The amount of bonus common stock issued with the preferred [144—140] was based on a definite number of total shares of common stock in the company; if the total were changed the bonus would naturally be changed to correspond.

Q. Was it not a fact that your father insisted that the old corporation should issue preferred stock, and that he should have that? A. It is not.

Q. Is it not the fact that your father insisted that a new corporation should be organized, to which all of the assets of the three named corporations in Exhibit "C" should transfer their stock?

A. It is not.

Q. Is it not true your father had nothing whatever to do with that, and that did not enter into the arrangement at all, whether or not there should be a new or an old corporation, whether preferred stock should be issued in one amount or another, in one denomination or another, or where the corporation, if a new one, should be organized?

A. My father gave me a good deal of advice in the matter, but he was entirely willing to trust Mr. Jackson's judgment.

Q. So then at the time your father advanced this money there was no understanding, except the very general one that you have testified to, that

(Testimony of David Taylor.)

he should receive preferred stock to the amount of \$25,000, with a bonus from you of one and one-half shares of common stock? A. Yes.

Q. Was it to be common stock in a new company?

A. That wasn't decided upon.

Q. I thought you testified that he was to have one and a half shares out of your 62 per cent of the stock in these three named corporations; was I wrong? A. No.

Q. Well, then, what was it; was it shares of stock in the new corporation, or shares of stock in the old corporation? [145—141]

A. It was shares of stock in the corporation which would operate the mine, whether that was to be an amended form of the old corporation, or a new corporation, had not been decided.

Q. So it was not the fact and you were mistaken when you said he was to have one and a half shares for one out of your 62 per cent of your stock?

A. I was not mistaken, that is what he was to have.

Q. The record here is, if I am not mistaken, that you testified he was to have one and a half shares for one share of preferred, to be paid out of your 62 per cent of stock that you are here seeking to get by specific performance; if you so testified you were mistaken, were you not? A. No.

Q. Now with regard to your father, did you ever have any agreement in writing with regard to this matter? A. No.

(Testimony of David Taylor.)

Q. Did he ever give you a written subscription at any time? A. No.

Q. So there was nothing but the payment of the \$25,000 under the circumstances that you have mentioned, which your father did, and no other term was definitely agreed upon, was it?

A. I don't think any other term was, no, sir.

Q. And the fact finally is that when you got that \$25,000, and before you had attempted to make any use of it whatever, you had your father's instructions that it was not to be used unless there should be a modified form of contract?

A. No, sir, not his definite instructions.

Q. You say not exactly his instructions; he told you not to do it, didn't he? A. No, sir.

Q. Then if a while ago you testified in substance and effect that he did, you were mistaken, were you; there were no strings on this \$25,000? [146—142]

Mr. THATCHER.—He has been asked and answered time after time, giving the facts; I object on the ground it is not cross-examination.

Mr. WHEELER.—The difficulty is the witness in giving his answers sometimes answers one way and sometimes the other.

The COURT.—I would like to have the witness answer that question. (By direction the reporter reads the question.)

WITNESS.—My father gave me that \$25,000 to take preferred stock in this Company, to take \$25,000 worth of preferred stock in this company, to

(Testimony of David Taylor.)

be accompanied by a bonus, as a result of the statements as to the tonnage and probabilities of the mine; whether just after he had given me that money, or whether it was before I got it, we got Mr. Baneroft's figures and estimate showing about what the report would be; Mr. Brown and my father and I then discussed the proposition, and we decided not to go in with it; my father told me, or advised me, or I think we left Denver with the idea of making a modified form of contract, in which that money would be used, with the other money I had available; whether he told me specifically that I could not put that in if I went through with the original deal or not, I do not know; we had decided before we left Denver not to go through with that deal.

Mr. WHEELER.—(Q.) Is that all your answer; is it complete? A. I hope it is, sir.

Q. Well, you know whether you are through or not. I wanted to know before interrupting you. You say preferred stock in that company; what do you mean by that expression?

A. In the company which would operate the mine under the new arrangement.

Q. Then it was not to be preferred stock in the old company or companies?

A. That was not definitely agreed. [147—143]

Q. Now with regard to Mr. Brown, he never did put up any money, did he? A. No.

Q. Did Mr. Brown ever give you a writing to

(Testimony of David Taylor.)

the effect that he would put up some money?

A. No.

Q. All you know is that Mr. Brown said he would? A. Yes.

Q. You don't remember whether it was five thousand or ten thousand dollars, do you?

A. I do.

Mr. THATCHER.—I object to the question on the ground that is not the witness' testimony.

The COURT.—There is some question in my mind as to whether that should be five thousand or ten thousand dollars. It seems to me just a few moments ago he spoke of five or ten thousand dollars.

Mr. THATCHER.—Yes, he did, and he also spoke on another occasion of ten.

Mr. WHEELER.—The witness has testified on direct examination that Mr. Brown agreed to put up ten thousand dollars, and he has testified on cross-examination that he does not remember whether it was five or ten thousand dollars. My question is now directed to this matter.

Mr. THATCHER.—Counsel is in error on that matter. Counsel has made his statement, and I will now make my statement as to the facts. The witness testified that Mr. Brown subscribed ten thousand dollars, and told him it was available to him at any time he wanted it; the witness also testified that before he went to New York, and that was the line of examination at that time,

(Testimony of David Taylor.)

that he agreed to take five or ten thousand dollars at that time, but that when he come back in May, Mr. Brown said he would take ten thousand dollars. They were different conversations altogether, and at different times. [148—144]

Mr. WHEELER.—Perhaps time would be saved if the witness would clear it up.

The COURT.—You may clear it up.

WITNESS.—Mr. Thatcher's statement is correct.

Mr. WHEELER.—(Q.) Well, state the fact?

A. It was ten thousand dollars.

Q. What was it about your remembering five or ten thousand dollars, testified to a while ago?

A. The five thousand or ten thousand dollar subscription made by Mr. Brown was made before I went East, saying that didn't know just how much he would want to take, but I could count on him for five or ten thousand, made some time before this.

Q. When you came back it was ten thousand?

A. It was ten thousand, yes, sir.

Q. Now this was all oral matter, was it?

A. Yes.

Q. Nothing in writing with Mr. Brown?

A. No.

Q. Now with your father it was at all times, I take it, \$25,000? A. Yes.

Q. There was no if or and about that, it was \$25,000 before you went East and \$25,000 after you came back, and there was no other sum?

(Testimony of David Taylor.)

A. Yes, sir.

Mr. WHEELER.—I ask counsel to produce if they have it, the original of the telegram dated May 25th, addressed to Mr. Thane, and signed by David Taylor—May 25, 1919; if not, if they have a copy of the telegram which they will vouch for.

Mr. THATCHER.—Can you go to some other line of examination while I look for it?

Mr. WHEELER.—Well, perhaps the witness can identify a copy.

Q. I hand you a document purporting to be a copy of a telegram, Postal Telegram, dated Denver, Colorado, May 25, 1919, addressed [149—145] to D. L. Thane, signed David Taylor; state whether or not you recognize that as a copy of a telegram sent by you to Mr. Thane? (Hands to witness.)

A. Yes, sir.

Mr. WHEELER.—If no objection is made to its not being an original, we will offer this.

Mr. THATCHER.—It is a copy, is it, Mr. Taylor? A. Yes.

Mr. THATCHER.—No objection.

Mr. WHEELER.—(Reads.) “Denver, Colorado, May 25, 1919. D. L. Thane, Willard Hotel, Washington, D. C. Bancroft reports more than forty thousand tons developed at least two sides thought has not yet got assay results new tonnage bayless reports titles good bancroft wires developments up to expectations and considers proposition good stop strongly opposed any government loan and employment Washington attorneys with cash retainer

(Testimony of David Taylor.)

brown taken ten thousand my father twenty thousand I can swing ninety five thousand if necessary with your twenty five this make necessary amount letter due Biltmore advise filing claim to comply with act there deciding latter on how best to push it duplicate New York. david Taylor."

(The telegram dated May 25, 1919, is marked Defendants' Exhibit "D.")

Mr. WHEELER.—(Q.) Calling your attention to our Exhibit "D" and to the phrase therein: "Brown taken ten thousand my father twenty thousand," were you or were you not mistaken a while ago when you said you father had taken twenty-five thousand?

A. I was not mistaken a while ago, sir; he did take twenty-five thousand at all times, agreed to.

Q. Why the phrase, "my father takes twenty thousand"?

A. Probably a mistake in the telegram, probably the word five left out. [150—146]

Q. I thought you recognized that as a copy of the telegram of the original you sent?

A. The statement in that telegram of twenty thousand is a mistake.

Q. Now you pin yourself down to the proposition that that is a mistake, don't you? A. Yes.

Q. You were trying to raise \$150,000, weren't you?

A. I think at that time there was five thousand necessary.

Q. At that time you were trying to raise \$150,000, were you not?

(Testimony of David Taylor.)

A. I think at that time there was five thousand dollars more necessary to make \$155,000.

Q. Is there any correspondence anywhere to show that \$155,000 was necessary? A. Yes.

Q. Is it not the fact that any talk about an additional \$5,000 came after the date of that telegram?

A. No, sir.

Q. As a matter of fact you now say the \$155,000 was necessary, and not \$150,000?

A. At that time, or just before I left Denver, a telegram came from the mine saying there had been an error in their accounts, that there was an additional five thousand indebtedness.

Q. So you still say that was an error in the telegram, and that your computation was not \$10,000 for Mr. Brown and \$20,000 from your father, making \$30,000; \$95,000 from you, making \$125,000, and \$25,000 which you desired from Mr. Thane, making \$150,000; you pin yourself to that, do you?

A. Yes, sir.

Q. At that time had Mr. Thane already subscribed \$25,000 conditionally, as testified to by you a while ago? A. Yes, sir.

Q. Before you sent that telegram to Mr. Thane then, and while you were in New York, Mr. Thane had subscribed \$25,000, conditioned upon Mr. Bancroft's reporting favorably upon the property?

A. Upon Mr. Bancroft's reporting favorably, and the auditors report [151—147] and satisfactory examination as to title, and so forth.

Q. And why did you send a telegram at that

(Testimony of David Taylor.)

date, asking him to subscribe \$25,000, if he had already made the subscription?

A. There were various telegrams back and forth, I think a few days before that, from Mr. Thane, that his \$25,000 would not be available until he returned to San Francisco; that he expected to be there at the beginning of June.

Q. Have you the telegram referred to just now in which he said that?

A. I think it is in the files.

Mr. WHEELER.—Will counsel kindly produce it.

Mr. THATCHER.—We have copies of it in which Mr. Poole wired to your clients to that effect.

Mr. WHEELER.—Mr. Poole's wire to our clients would not be evidence against this witness.

Q. Examine the telegram which I hand to you, addressed David Taylor, Denver, Colorado, and signed B. L. Thane, and state whether that is the telegram you have referred to in your last answer? (Hands to witness.) A. That is.

Mr. WHEELER.—We offer it in evidence and ask that it be marked our Exhibit "E."

(Telegram dated May 29th, is marked Defendants' Exhibit "E.")

Mr. WHEELER.—I am about to call the attention of the witness to the fact that this is dated the 29th day of May, four days after; a moment ago you testified that in a telegram Mr. Thane had withdrawn from this transaction, or told you that he could not take care of it until he got back to San

(Testimony of David Taylor.)

Francisco, and you say that this is the telegram on which you acted?

Mr. THATCHER.—What date is that?

Mr. WHEELER.—May 29th. I will read the telegram in evidence. (Reads:) “1919 May 29 David Taylor Denver Colo. [152—148] “Your wire May twenty seventh it is impossible me to arrange twenty five thousand by second without my actually having to be in San Francisco and as soon as I found I was going to be delayed on account of the work which I now have to do in Washington and therefore would be unable to be in San Francisco as soon as expected I asked Poole if he would arrange so the twenty-five thousand would not be called until I had time to arrange it in San Francisco he said he would be glad to do this and I am sure he will be able to arrange it stop the people in New York before whom I have already laid this have not turned it down but are slow in giving me answer and I cannot press them beyond what I am already doing stop I am certain if you make a payment of one hundred twenty five thousand as planned Poole and his partners will ge glad give a thirty day extension on the balance which will permit me to clean up my work and go west and make necessary arrangements stop the work which I have to do immediately in Washington is much more vital to my associates and myself than anything else at this time so it is impossible for me to leave until it is finished stop am wiring Poole asking him to arrange to give you all necessary assurance of an ex-

(Testimony of David Taylor.)

tension of time on the twenty five thousand and I am sure he and his associates will be agreeable to this stop if I succeed in getting this eastern group in will try arrange so that money is forth coming immediately and anticipate if they decide come in they will want take up a larger percentage of the underwriting. B. L. Thane."

Q. Now how did that telegram dated the 29th influence you to send your telegram dated the 25th?

A. It could not have, sir; I must have been mistaken and that was the answer; there were a number of telegrams of Mr. Thane dealing with that subject at that time. [153—149]

Q. At no time did you understand Mr. Thane was acting in that for himself, and offered, himself, to put up \$25,000, did you? A. I did.

Q. You don't understand that he would act in the hope New York parties would advance \$25,000, and that he would thus be able to make the payment?

A. No; in that connection, Mr. Thane was to put up \$25,000 of his own, and he was attempting to get money elsewhere in New York.

Q. So then, the words of his telegram of the 29th with regard to the \$25,000, do not in any way refer to his expecting to get that \$25,000 from New York people, as you understand the telegram, is that right?

Mr. THATCHER.—I object; the telegram itself shows.

Mr. WHEELER.—I am getting the witness' un-

(Testimony of David Taylor.)

derstanding, getting at the basis of his readiness to perform.

Mr. THATCHER.—I object on the ground the telegram itself is the best evidence of its contents; and this witness is not competent to testify as to the mental attitude or meaning of Mr. Thane's telegram.

Mr. WHEELER.—It is his own understanding on which he has based his statements that he was at all times ready, able and willing to advance this money.

The COURT.—You may answer the question.

(The reporter reads the question.)

A. They do not.

Mr. WHEELER.—(Q.) Then why, if you understood that he had agreed to come in on his own account with \$25,000, subject to Mr. Bancroft's report, did you send the telegram dated the 25th, in which you ask if he will come in for that amount?

A. He had agreed some time before that to come in for that amount. [154—150] I am sorry, sir, if I did not get your question.

(The reporter reads the question.)

A. Because I had previously gotten several telegrams from Mr. Thane, stating that he would be delayed in putting up the \$25,000, that he could not put it up until he got to San Francisco; I did not want to have to put it up myself, and I tried to get him to put it up.

Q. Did you have any written agreement of any

(Testimony of David Taylor.)

kind with Mr. Thane with regard to his putting up \$25,000? A. No.

Q. So that in testifying on direct examination that Mr. Thane was to come in with \$25,000, or words to that effect, you meant come in under the conditions that are now indicated by his correspondence, that telegram to you?

A. I mean that he was to come in under the conditions of Mr. Bancroft's and the auditor's and legal reports being satisfactory.

Q. But that was otherwise unconditional, and you understood from first to last that it remained unconditional, is that it?

A. I understood that Mr. Thane was to put in his own money, \$25,000 in the beginning.

Q. Were you sure that that was his understanding of it after this telegram dated the 29th of May?

A. I am not sure, no.

Q. Were you sure that was his understanding of it when you telegraphed him on the 25th of May?

A. I am not sure what his understanding was.

Q. Were you sure? A. I was not.

Q. Now with reference to the money which you say that you had on hand, did you have it in your own personal account, or was it an account of the corporation? A. My own personal account.

Q. When was the amount in bank which you have indicated, on what date did it appear there?

A. May I refer to the bank statement? [155—151]

Q. Yes.

(Testimony of David Taylor.)

A. There was a balance there May 31st.

Q. Kindly let me see that statement. (Witness hands statement to counsel.) How long had you had a checking account with the New York Trust Company prior to the month of May, 1919?

A. I don't remember when I first opened it; I have had it there for a good many years.

Q. Is that the depositary that you use in your business?

A. It is one of the depositaries, yes, sir.

Q. And although the account is in your name, you really make deposits there for the corporation referred to by you? A. I do not.

Q. Have you ever?

A. I don't think I ever have, the corporation has its own account in the same bank.

Q. So in the transaction of the business of the corporation this account is in no manner made use of?

A. No, sir; I occasionally have loaned money from one account to another, as I have had purposes for it.

Q. This was an account which was your regular account, into which you placed money, out of which you took money, and was not a special account made for the purpose of this transaction?

A. No, sir, it was not.

Q. So what you mean to say is that your bank balances at certain days are correctly shown in your bank account by the statement which you have just given to my hand?

A. Absolutely, sir, yes, sir.

(Testimony of David Taylor.)

Mr. WHEELER.—We ask that it be marked for identification our exhibit “F.”

(The bank statement is marked Defendants’ Exhibit “F” for identification.)

Mr. WHEELER.—(Q.) You have spoken in the telegram addressed to Mr. Thane about \$95,000 that you could swing; you meant thereby [156—152] that you had money or assets available in your own private accounts that you could use for your own purpose, is that right? A. Yes, sir.

Q. That was not money that you obtained from any person for that purpose? A. No, sir.

Q. It was not money held in trust by you to purchase therewith interests in this property, or in any other property, was it? A. It was not.

Q. In other words, it was your private assets?

A. Yes, sir.

Q. In all of these times you have been a man of some means at least, have you not?

A. The last few years, yes, sir.

Q. And you were in 1919 a man of some means?

A. It depends upon what you call some means.

Q. This account represents a portion of your individual capital, does it not? A. Yes, sir.

Q. It represented at that time a very considerable portion of your individual capital, did it not?

A. Yes, sir.

Q. It represented at that time substantially all of your individual capital, did it not, with the exception of the business that you were conducting in Denver? A. No, sir.

(Testimony of David Taylor.)

Q. What portion, without going into details, did it represent of your individual capital?

A. That is this balance in this statement?

Q. Yes.

A. About thirty-five per cent, I should say.

Q. You have spoken of having bonds and other assets, you mean that they were bonds that consisted of a part of your private capital?

A. Yes, sir.

Q. And that they were in such form and condition, you desire to be understood, that they could be used for the purpose of raising money thereon to go into this, or any venture that you saw fit to [157—153] go in on, is that right? A. Yes.

Q. In other words, a part of your private property, without any strings on it? A. Yes.

Q. Not any property accumulated or acquired particularly for this transaction? A. No, sir.

Q. All of this was property that you had on the 2d day of April, and which you had seen fit to use at that time from that day forward, you could have used it in the same way that you now say you were prepared to use it later on, is that not so?

A. I should say approximately all of it was, yes, sir.

Q. So that no special efforts of any kind were made by you to get the money that you say you were prepared to go through this transaction with, so far as you individually were concerned, in the proportion that you thought of contributing to the transaction?

(Testimony of David Taylor.)

A. A great many efforts were made because I didn't want to put my own money into it.

Q. You misunderstood me. Read the question, please.

(The reporter reads the question.)

A. Yes, sir, certainly efforts were made.

Q. What were they?

A. I sold some \$75,000 worth of stocks and bonds on the New York Stock Exchange at a very decided loss, which I personally owned, so as to have the money on deposit by the first of June.

Q. Anything else?

A. Yes, I had arranged to—oh, of that money, no, sir.

Q. When did you make the sale which you referred to of stocks and bonds on the New York market?

A. Somewhere between the 10th and 15th or 18th of May, scattered along at different periods.

Q. Some of it, then, you sold after you had determined to have Mr. Bancroft make a report, did you not?

A. I don't remember the exact day that the Bancroft report was [158—154] arranged for.

Q. I understood you to say that it was about the 12th?

A. I said somewhere about the 12th or 13th or 14th, I am not sure of the exact date.

Q. Well, if it was the 12th, 13th or 14th, some of the stocks that you sold in anticipation of this transaction were sold after you had determined

(Testimony of David Taylor.)

to have Mr. Bancroft make a report on this property?

A. If they were sold after that date, they were.

Q. Whether sold thereafter you cannot tell us?

A. No, sir, not exactly.

Q. Would anything in your deposits in bank refresh your memory, and enable you to tell us, as indicated in the document offered in evidence?

A. No, sir, they will not exactly, no.

Q. Was it the fact that at all times after the 2d day of April, you intended to contribute any money, or any considerable sum of money to the amount that was to be furnished?

A. I expected to contribute some in the beginning, I did not know how much.

Q. Were you prepared at all times from the beginning, and did you expect to advance as much as thirty odd per cent of your private fortune in this transaction, if occasion required?

A. No, sir, I did not expect to I always thought of that as a possibility.

Q. Counting it as a possibility and if you found you could not arrange it otherwise through other persons, were you prepared at all times, without any further investigation, to advance 30 per cent and upwards of your private fortune in order to carry through this transaction?

A. I considered it always a possibility.

Q. Answer the question, please.

(The reporter reads the question.) [159—155]

A. I was prepared to, yes, sir.

(Testimony of David Taylor.)

Q. And intended to do it?

A. No, sir, I did not intend to.

Q. You would have done it, though, without any further investigation of the property?

A. I don't know whether I would have or not, till the time came.

Q. That is exactly what I wanted to find out.

(At 4:35 P. M. an adjournment is taken until tomorrow, Thursday, September 16, 1920, at 10:00 o'clock A. M.)

Thursday, September 16, 1920.

Court convened, 10 o'clock A. M.

Cross-examination of Mr. DAVID TAYLOR,
Resumed.

Mr. WHEELER.—Counsel will aid me if they will have ready all telegrams which passed between the witness and Mr. Bancroft in the month of May, 1919, both to Mr. Bancroft from the witness and from Mr. Bancroft to Mr. Thane, or from Mr. Thane to Mr. Bancroft, in which the witness has any participation.

Q. Mr. Taylor, in regard to the subscription of Mr. Brown, as I understand you, before you went to New York he had said that he would subscribe \$5,000, but after you returned from New York soon after the middle of May, 1919, he said that he would subscribe \$10,000, or words to that effect; is that correct?

A. That is not exactly correct; no, sir.

Q. State then what the circumstances were, fully.

(Testimony of David Taylor.)

A. When I went East in the beginning, Mr. Brown said that he would take five or ten thousand dollars.

Q. And when you returned?

A. When I came back he said he would take ten thousand. [160—156]

Q. What date did you return to Denver from New York? A. May I refer to my diary, sir?

Q. Surely. You left New York on what date and arrived in Denver on what date?

(Witness refers to diary.)

A. I left New York on May 17th, arrived in Denver on May 19th.

Q. How soon after arriving in Denver did you see Mr. Brown?

A. I probably saw him the same day; we have offices in the same place; I am not sure.

Q. At that time did you see him alone, or with your father? A. I could not tell you, sir.

Q. At that time you were keeping Mr. Brown fully advised, I take it, as to what you were doing in this transaction?

A. Yes, in a very general way.

Q. Explained to him at that time that you were going ahead with the matter.

A. Whether I explained to him that day, or within the next two or three days, I don't know; I can't say just what date I saw Mr. Brown.

Q. You explained to him that Mr. Bancroft was going out on the property? A. Yes.

Q. And he said to you after you had explained

(Testimony of David Taylor.)

the then status of matters just what, with regard to the \$10,000?

A. I am not sure that I made the explanation first or not; he said at the time that he would take \$10,000; his first limitation was that he didn't know at that time whether he would have an extra \$5,000 free, is the reason in the beginning he had only permitted himself the five.

Q. At any rate, you were not sure, you say, that you told him about the status of matters before he said ten thousand dollars.

A. Not particularly at that time, no, sir.

Q. What is your best impression—your best impression is that in [161—157] dealing with this gentleman you informed him of the exact status, isn't it?

A. My best impression would be that the first time I saw him I talked over everything with him, because I do that in various matters in which he is interested with me.

Q. Was it the first time you saw him that he increased his promised subscription to \$10,000?

A. I could not tell you, sir.

Q. It might have been later on?

A. It might have been, yes, sir.

Q. Might it have been after you had received Mr. Bancroft's report? A. Very improbable.

Q. When with reference to the time that your father handed you the \$25,000 to send to New York did your talk with Mr. Brown occur?

A. I could not tell you, sir.

(Testimony of David Taylor.)

Q. May it not have been after?

A. Very improbable that it was after, because the date of the deposit of that check of my father's in New York shows that was sent, must have been sent, from Denver about the 28th—27th or 28th; Mr. Brown was in the office and I was talking to him subsequently about this and other things.

Q. Did you tell him that you had received advices from Mr. Bancroft? A. What advices?

Q. Telegrams or communications by telephone or letter, giving you the results, any of them, of his examination of the mine?

A. The first time Mr. Brown came in the office or I saw him after the receipt of any telegrams or letters in connection with this matter; I took them up with him, always.

Q. Did you show or read them to him?

A. Whether I showed or read them to him, or told him what was in them, I don't know. [162—158]

Q. At any rate, you told him the contents of the telegrams? A. Yes, sir.

Mr. THATCHER.—(Q.) Both as to the first telegram you received, and also as to the letters telegrams or communications? A. Yes, sir.

Mr. WHEELER.—Let me have, if you please, the communications that passed between you and Mr. Bancroft, beginning with your first wire to him from New York, asking him to make this examination.

Mr. THATCHER.—It will take him some little

(Testimony of David Taylor.)

time to sort those out; Mr. Bancroft has them all—has copies of all of them.

Mr. WHEELER.—I will be very glad to facilitate matters in that way, it will also help to get Mr. Bancroft on the stand at an earlier moment.

Mr. THATCHER.—This is from what date?

Mr. WHEELER.—From the time he was in New York; the first telegrams that passed between him and Mr. Bancroft from New York, or Mr. Thane and Mr. Bancroft; as I understand, Mr. Thane and Mr. Bancroft were acting together.

Q. I hand you a telegram dated May 14th, New York, addressed to Howland Bancroft, and signed David Taylor; was that telegram sent by you to Mr. Bancroft at that time? A. Yes, sir.

Mr. WHEELER.—We offer it in evidence, and I will read it now into the record, with the agreement that a copy may be substituted, as Mr. Bancroft wishes to keep his files.

Mr. THATCHER.—I am willing to let the record stand, and not have a copy.

Mr. WHEELER.—I think a copy ought to be put in; it is always more convenient. We can be certain that the copy is a correct copy, and I want all of the time marks, etc., upon it. (Reads:) “1919 May 14 A. M. 7:33, New York, N. Y. Howland Bancroft Cr B. Bane [163—159] 408 Crocker Bldg., San Francisco, Calif. Important get immediate opinion mine no extended examination needed but want your statement that forty thousand

(Testimony of David Taylor.)

tons sure with one point four recoverable when can you leave for mine answer thirty Pine street. Poole here. David Taylor."

(The telegram is marked Defendants' Exhibit "G.")

Mr. WHEELER.—(Q.) Do you recognize the document now shown to you, according to the telegram, from Mr. Bancroft to you, as a copy of a document received by you in due course?

A. Yes, sir.

Mr. WHEELER.—We offer it in evidence. I will read it. (Reads:) "San Francisco, Calif. May 15, 1919. David Taylor 30 Pine Street New York, N. Y. Your wire fourteenth. Impossible to determine amount and content of ore without sampling. Stop. Will be exceedingly busy for some time and am not at all certain that I can undertake the work. Stop. While I should like to make this examination suggest you get some one else." Signed Howland Bancroft.

(The telegram dated May 15, 1919, is marked Defendants' Exhibit "H.")

Q. I will ask the witness, to save time: Did you receive any communications other than by wire, from Mr. Bancroft, in this month of May, or after the 14th day of May, 1919?

A. I don't remember any, no, sir, I may have.

Q. Have any telephone communications?

A. I don't think so, no, sir.

Q. I hand you a wire dated Tungsten, Nevada, May 22, 10:20 P. M., purporting to be to you from

(Testimony of David Taylor.)

Mr. Bancroft; do you recognize that as a wire received by you? A. Yes, sir.

Mr. WHEELER.—I offer it in evidence. I will read it. (Reads:) “Tungsten Nev 855 P 22 A May 22 PM 10 20 David Taylor 730 Symes Bldg Denver Colo Your letter twentieth just received [164—160] stop required tonnage exposed on at least two sides stop can give no positive assurance regarding tungsten contents until receipt of assay returned stop believe property will hold up and my former favorable opinion remains unchanged stop am leaving for Denver from Imlay train number two or twenty early Saturday morning please tell Miss Furber. Howland Bancroft.”

I call your attention to the phrase “required tonnage exposed on at least two sides”; you understood that to refer to the 40,000 tons suggested in your telegram heretofore offered in evidence, did you not? A. Yes, sir.

(The telegram dated May 22d is marked Defendants’ Exhibit “I.”)

Q. I call your attention to a copy of a telegram dated May 20, 1919, addressed to Mr. Howland Bancroft, Lovelock, Nevada, signed David Taylor; do you recognize that as a copy of the wire sent by you to Mr. Bancroft? A. Yes, sir.

Mr. WHEELER.—We offer that wire in evidence. (Reads:) “Denver Colo May 20, 1919—4:30 P M Mr. Howland Bancroft, Care of Nevada Humboldt Tungsten Mines Co., Lovelock, Nevada. Important letter due Mill City Wednesday mid-

(Testimony of David Taylor.)

night mailed you today. David Taylor." Let this be our Exhibit "J," please.

(The telegram dated May 20, 1919, is marked Defendants' Exhibit "J.")

Mr. WHEELER.—(Q.) In the telegram just offered in evidence reference was made by you to an important letter; I hand you a letter addressed Mr. Howland Bancroft, what appears to be a copy of one, with the words "Your sincerely, May 20, 1919"; is that a carbon copy of the so-called important letter referred to in your wire?

A. Yes, sir.

Q. Was the original of that letter signed by you?

A. Yes, sir. [165—161]

Q. And mailed to Mr. Bancroft? A. Yes, sir.

Mr. WHEELER.—I will read the letter in evidence. (Reads:) "Denver, Colorado, May 20, 1919. Mr. Howland Bancroft, Nevada Humboldt Tungsten Mines Co., Mill City, Nevada. Dear Howland: I was glad to learn you were again at the mine, and this morning have your letter advising of your plans for an assistant and for arranging a quick assaying by Watts.

"John G. Jackson, New York attorney, is now planning to leave New York Friday, May 23rd, spending a day in Chicago, which would bring him to Lovelock May 29th. I do not wish to go to this expense if your examination does not check up our idea that there is at least 40,000 tons of ore assured, with probabilities of a big additional tonnage, so that, if upon receipt of this letter, you can give me

(Testimony of David Taylor.)

any idea as to whether you think the tonnage is there or not, I wish you would wire me either 'Advise postponing lawyer's trip,' or 'Advise having lawyer leave at once.'

"Inasmuch as eventually Thane and I will hope to place the preferred stock in New York, we thought it better to have a New York lawyer O. K. final form of incorporation, etc.

"If it is in any way possible I want to get the deal closed before the first of June, so that I personally will not have to 'carry the sack' for the concentrates now being produced and to be shipped in the beginning of June. If I have to do this it means so much less available money for making good the deficiency between \$150,000.00 and what Thane finally raises in New York.

"Please wire me definitely upon receipt of this letter whether or not you can express an opinion by the end of the week. With regards, Yours sincerely."

The witness says it was signed David Taylor.

(The letter dated May 20, 1919, is marked Defendants' Exhibit "K.") [166—162]

Mr. THATCHER.—I think we have a couple of other telegrams.

Mr. WHEELER.—I am very anxious to get the telegram in evidence which was sent in response to that letter of May 20th. Is there not a telegram saying something to the effect that you report favorably?

Mr. THATCHER.—That was the only telegram.

Mr. BANCROFT.—That was the only one referring to tonnage.

Mr. WHEELER.—I desire particularly at this time any telegrams or communications of any kind, telephonic, by letter or by telegram, referring to the assays, or to anything else.

Mr. THATCHER.—I will get that, too.

Mr. WHEELER.—Is there not a telegram saying that you consider the proposition good?

Mr. BANCROFT.—That was the same wire.

Mr. WHEELER.—If you have such a telegram, I would like a telegram from Mr. F. M. Taylor, father of the witness, which I assume suggests that you make the trip.

Mr. BANCROFT.—I have no recollection of receiving a wire from Mr. F. M. Taylor.

Mr. WHEELER.—No wire whatever?

Mr. BANCROFT.—No.

Mr. WHEELER.—Any letter?

Mr. BANCROFT.—No.

Mr. WHEELER.—Then the wire from Mr. Thane is the one I want. (The papers are handed to counsel for defendant.)

Mr. WHEELER.—(Q.) I hand you a telegram dated June 2d, 6 A. M. addressed to David Taylor, signed Howland Bancroft; and also another dated May 30, B. L. Thane, signed David Taylor; are both of those telegrams familiar to you, and did you send the one purporting to be signed by you, and did you receive the one purporting to be signed [167—163] Howland Bancroft? A. Yes, sir.

Mr. WHEELER.—We offer in evidence a telegram dated May 30, 1919, addressed to B. L. Thane. (Reads:)

“Ogden Utah May 30, 1919.

“B. L. Thane Biltmore Hotel, New York City.

“Bancroft original tonnage estimate all right but large part not commercial thus accounting for only twenty thousand tons average recoverable tungsten one point forty six per cent tungstic acid showing sure profit of only hundred thousand dollars stop will endeavor extent present option six months having friendly bankrupt proceedings and myself appointed receiver make Poole superintendent build assay office get assayer at mine and make agreement with court that we will exercise option whenever Bancroft will certify to forty thousand tons of one point four recoverable developed ore on at least two sides stop Bancroft still believes general prospects for big cheap mine excellent stop on this basis will you agree to take twenty five thousand on same basis when requisite tonnage and grade developed stop if you approve suggest wiring Poole urging him to favor this plan address Lovelock Saturday.” Signed David Taylor.

(The letter dated May 30, 1919, is marked Defendants' Exhibit “L.”)

Mr. WHEELER.—Under date of June 2d, 1919: (Reads:)

“David Taylor Palace Hotel San Francisco, Calif.

(Testimony of David Taylor.)

“Final assays received today stop results of sampling show that the total developed partially developed and indicated ore of a commercial grade in the Nevada Humboldt Mine as at May twenty fourth this year is eighteen thousand four hundred and seventy seven tons stop the average grade of this tonnage as indicated by assay returns from detailed sampling is one point sixty-four [168—164] tungsten trioxide stop the above summary may be attached to and form a supplementary part of my preliminary report on this property dated February fifteenth nineteen nineteen. Howland Bancroft.”

(The telegram dated June 2, 1919, is marked Defendants' Exhibit “M.”)

Mr. THATCHER.—Did you ask for another message from Mr. Thane to Mr. Bancroft of about the 14th?

Mr. WHEELER.—Yes, I did.

Mr. THATCHER.—The best we can give you is a copy, and the only way we can identify it, Mr. Thane not being here, Mr. Bancroft can merely say it is not in his files, it is in ours.

Mr. WHEELER.—I take it if the witness saw the telegram—

Mr. THATCHER.—(Q.) Was Mr. Thane in New York with you on the 14th, Mr. Taylor?

A. Yes, I was there and saw that telegram.

Q. Were you sending telegrams at the same time?

A. Yes.

Q. When you sent your telegrams to Mr. Bancroft

(Testimony of David Taylor.)

did Mr. Thane also send telegrams to Mr. Bancroft?

A. Yes, the next day he dictated one in my presence.

Q. So that that part of the correspondence shown here, Mr. Thane to Mr. Bayless, Mr. Thane to Mr. Bancroft, and yourself to Mr. Bancroft, you and Mr. Thane, in other words, were attending to these matters together in New York? A. Yes.

(Counsel for plaintiff hands letter to the witness.)

A. Yes, sir, that is it.

Mr. WHEELER.—The witness, your Honor, has identified a copy of a letter now to be offered, and counsel consent that it may be offered in lieu of the original. The letter reads:

“May 14, 1919.

“Holland Bancroft, Care B. L. Thane,
408 Crocker Building, San [169—165] Francisco, Calif.

“I am glad to hear that you have returned from Mexico. Please advise me by night letter your general opinion on the Copale proposition as I would like to talk to Mr. Jackling about it before he leaves here. Stop. Mr. Taylor advises he has wired you to make immediate examination of Nevada Humboldt Tungsten Mine. The principal purpose to determine and have report complete and available in San Francisco before May thirty first on the tonnage in sight as well as general outlook of property. This must be known in order that we may be certain there is sufficient tonnage to absolutely guar-

(Testimony of David Taylor.)

antee the hundred and fifty thousand dollars necessary to close the transaction. For your information I am satisfied deal which Mr. Taylor has made is the best he could make under the circumstances and even so it is not going to be the easiest thing to close this transaction under present conditions but we are hopeful of doing so. Stop. Bayless will show you a wire which I have sent him today which will be self explanatory. I hope you will be able to co-operate with him and with us in every way to make this transaction possible because if we are able to close it it will be a good piece of business for all of us and everything must be in final shape by May thirty first and available in my San Francisco office at that date. Stop. Taylor suggests that if you can make examination immediately and then proceed to Denver he could meet you there next week on his way to San Francisco. Please advise me your procedure. B. L. Thane.”

(Letter dated May 14, 1919, is marked Defendants’ Exhibit “N.”)

Mr. WHEELER.—In this connection, I offer the telegram identified by Mr. Bayless, our Exhibit “A” for identification, and ask that it be considered read, let it go in finally now as Exhibit [170—166] “A.” Is that satisfactory to counsel?

Mr. THATCHER.—Yes.

(The letter dated May 14, 1919, heretofore marked Defendants’ Exhibit “A” for identification, is admitted and marked Defendants’ Exhibit “A.”)

Mr. WHEELER.—There is but one passage here

(Testimony of David Taylor.)

to which I desire to call the Court's attention at this time: "I am wiring Bancroft as Taylor already has done to make immediate examination of ore reserve so that we may be sure that payment is warranted."

Q. The first telegram to Mr. Bancroft appears to have been sent by you on May 14, 1919; on what day did you reach the conclusion to have an examination of the mine made? A. By Mr. Bancroft?

Q. By anyone?

A. On Mr. Thane's advice coming East on the train, along about the beginning of May.

Q. About the beginning of May? A. Yes.

Q. Did you negotiate with any other person before sending this telegram to Mr. Bancroft to have an examination made?

A. I think it was suggested by Mr. Holter, one man I put this thing up to in New York, that if he became interested he would want to send his own engineer out there; he didn't do it because he did not take an interest.

Q. That was early in May, was it?

A. I can give you the exact date if you want it, sir.

Q. You say you can give it to me exactly?

A. I can give you the exact date of my talk with Mr. Holter, if you want it.

Q. Yes, give me the exact date.

The COURT.—Has he answered that question when he first determined [171—167] to have the

(Testimony of David Taylor.)

examination made by Mr. Bancroft, the first or middle of May?

Mr. WHEELER.—First in the month of May when he concluded to have it done.

The COURT.—He didn't say the first of May, but decided in May?

WITNESS.—I meant to say the first of May.

Mr. WHEELER.—(Q.) You meant to say the first of May?

A. In the beginning of May, on my way east with Mr. Thane.

Q. I understood you to say in the very beginning of May the question of having the mine experted arose, and you decided on a certain day to have the mine experted, and I understood you to say this gentleman wanted it experted if he went into it; now you are giving me that date, am I right?

A. Yes, sir, May 9th.

Q. Then before Mr. Bancroft was wired on May 14th, had you not discussed the question of having an examination made for yourself by another expert? A. No, sir, not for myself.

Q. At any rate there was discussion of having another expert make an examination, was there?

A. Yes.

Q. Was any name mentioned?

A. I don't remember the name; there was a man in Mr. Holter's office—Mr. Holter was an engineer—one of his assistants that he thought of sending out there, if he went ahead; I could not tell you his name.

(Testimony of David Taylor.)

Q. As between you and Mr. Thane, was there not a discussion prior to the 14th day of May about sending Mr. Brunton out?

A. No, sir, nobody could send Mr. Brunton out.

Q. What say?

A. No, sir, there was no such discussion between us of sending Mr. Brunton out; there was a discussion mentioned by [172—168] me several times, if Mr. Brunton would take an interest in it, he might go out on his own account and look at it for himself; Mr. Brunton does not do any consulting work for anybody else.

Q. How soon before the 14th day of May did you and Mr. Thane agree that Mr. Bancroft should be wired to?

A. Mr. Thane advised it when we went over and prepared our prospectus on the train going East, on our way from Lovelock to New York; and at various times after that insisted on it.

Q. And you assented? A. Yes.

Q. As early as what date?

A. I could not tell you the exact date.

Q. When did you first determine that you, yourself, would make a contribution of \$95,000 to the transaction?

A. I could not tell you the exact date, sir.

Q. Endeavor, if you please, to fix it approximately.

A. It would be absolutely impossible for me to fix it; I don't know when I determined, between the time the contract was signed and I was ready to close

(Testimony of David Taylor.)

the deal, on what day I could not possibly tell you.

Q. You say when you were ready to close the deal? A. Yes.

Q. What date do you fix as the date when you were ready to close the deal?

A. The exact date I could not fix; I should say when we sent Mr. Jackson out; when all the reports were ready that everything was satisfactory.

Q. Then when you concluded that would advance a large amount of money, you had also reached the conclusion that you would not advance it unless the reports were received and everything was satisfactory, is that true? A. Yes, sir.

Q. In other words, you did not intend as a business man to advance in this transaction \$95,000, or any other large sum, unless the reports [173—169] should be satisfactory, is not that so?

A. Not altogether, no, sir.

Q. Well, what is the fact?

A. The fact is on the train going East with Mr. Thane, I offered to put up \$75,000 myself, if Mr. Thane would put up \$75,000 to go through with the deal at that time; Mr. Thane refused and said it is perfectly absurd, you want that thing checked up, have got to have it checked up, and at that time, from then on, we discussed Mr. Bancroft and other people making a check examination.

Q. You knew Mr. Thane as a competent mining man, did you not? A. Yes, sir.

Q. And did you place any stock in what he said as to checking up the property? A. Naturally.

(Testimony of David Taylor.)

Q. And so you did believe from that time forward, from the time that you were going East upon the train, that before you would consent to come into it with any large amount of money, you should have the property checked up, and so agreed with Mr. Thane?

A. I don't know when I absolutely agreed with Mr. Thane.

Q. At any rate it was your understanding from the time that gentleman, distinguished in mining matters, made that suggestion to you that it was the thing that you ought to do under the conditions, before you would go ahead with the transaction, and put up a large sum of money, or ask him to do it; is not that so?

A. Probably so, yes, sir; just the exact date whether I should have gone ahead or not with a certain sum of money, I don't know, I didn't.

Q. When was it definitely determined, and did you place yourself in a position that you would advance a large sum of money on this transaction, when with reference to your conversation with Mr. Thane? [174—170]

A. I could not tell you exactly.

Q. How long after you reached New York did you proceed to place yourself in that position?

A. The position of being able to take it?

Q. Yes.

A. Why, I sold some stocks and bonds, and made arrangements to have cash on hand, enough to take it, along between the 12th and 17th of May.

(Testimony of David Taylor.)

Q. So you intended to be in a position, if it checked up right, to do that, is that it?

A. Yes, sir.

Q. And on some day intermediate to your trip on the train with Mr. Thane to New York and on the 14th day of May, you reached the conclusion that you would employ Mr. Bancroft to have him make an examination in order to advise you whether or not there were sufficient ore reserves there to justify you in putting up a large amount of money?

A. Yes, sir.

Mr. WHEELER.—That is all for the present. You may call Mr. Bancroft now, if you wish. [175—171]

Testimony of Howland Bancroft, for Plaintiff.

Mr. HOWLAND BANCROFT, called as a witness on behalf of plaintiff, after being sworn, testified as follows:

Direct Examination by Mr. THATCHER.

Mr. WHEELER.—So far as I am concerned, as to preliminary questions, you need not ask any qualifying question; we admit the ability, character and expert standing of the witness.

Mr. COOKE.—The same as to us.

Mr. THATCHER.—Under the circumstances, I see no reason to ask them.

Mr. COOKE.—That is the reason we waive them, to save time.

(Testimony of Howland Bancroft.)

Mr. THATCHER.—(Q.) Mr. Bancroft, what is your full name? A. Howland Bancroft.

Q. What is your profession, please?

A. I am a mining geologist by training, and valuer and examiner of mining property and metaliferous deposits by experience.

Q. Your qualifications being admitted, will you state whether or not you became familiar with the Nevada Humboldt Tungsten Mining Company, and with its properties?

A. Whether or not I became, or when I became?

Q. Whether or not you did become?

A. I did become familiar.

Q. Will you state when they first came to your attention, and the history leading up to it?

A. The Nevada Humboldt Tungsten Mining Company negotiations was first called to my attention in San Francisco, approximately the end of October, 1918, at which time I was investigating a number of tungsten deposits for the Rare Metals Ore Company, in Denver, Colorado, clients of mine in Colorado. I had looked at several properties, and knowing Mr. Thane in San Francisco, I asked him if he [176—172] knew of meritorious tungsten deposits which I might refer to my clients, then represented by me on this particular trip. He suggested, and practically he gave me his files, and brought one of his engineers in, Mr. Hyder, to discuss the properties; among these properties was the Nevada Humboldt Tungsten Mines Company property; and he handed me a report upon this property by Mr.

(Testimony of Howland Bancroft.)

Hyder; I submitted this to my principal, or one of my principals, who accompanied me on this trip, and the property appeared to be interesting from the view point of an ore body. The price at which the property was offered was prohibitive, and we so informed Mr. Thane; and there was no further interest in the matter at that time. We proceeded to Nevada—I say we, I mean myself and Mr. Nelson Franklin, vice-president and general manager of the Rare Metals Ore Company of Colorado; we proceeded to Nevada, investigated a number of other tungsten properties, and received communications from Mr. Thane in Ely, suggesting that the negotiations for the Nevada Humboldt Tungsten Mines Company might be adjusted to our satisfaction; in other words, that we might be able to arrange some sort of a deal whereby the property would become of interest to us under the terms and conditions. Mr. Thane requested a meeting; we informed Mr. Thane that we would meet him in Reno, and came back to Reno to keep our promise. We there met Mr. Thane and Mr. Pettigrew; and it was suggested by some of the interested parties in the Nevada Humboldt Tungsten Mine Company mine that we make a visit to their property—Mr. Thane, Mr. Pettigrew, Mr. Franklin and myself. We decided to go up and see the property, which we proceeded to do early in November, 1918. We spent one day on the property, and took no samples, but we were shown through the mine by Mr. Morrin, as I recall it; I am not sure whether Mr. Poole went under-

(Testimony of Howland Bancroft.)

ground with us or not; in any event, the property looked attractive, and we proceeded on to Denver, and I handed in my report on the general [177—173] investigation I had made, and I spoke in favorable terms of the Nevada Humboldt Mine to the Rare Metals Ore Company. Negotiations continued between Mr. Thane and me and the Rare Metals Ore Company for a period of approximately six weeks; at the same time, I understand from the wires, Mr. Thane was in conference with Mr. Friedman, and possibly with others, but I don't know. Mr. Thane was very anxious to have Mr. Franklin and me return to San Francisco, and tried to arrange a proposition that would be equitable and satisfactory to all of us. Eventually the Rare Metals Ore Company decided not to be further interested, this being approximately the 31st of December, 1918, and I asked Mr. Wood, the president of the company, if he had any objection to my taking this matter up with others; Mr. Thane in the meantime, having suggested certain definite arrangements which the Rare Metals Ore Company was unwilling to accept, and which, by the way, I did not recommend them to accept. I received their release from any further interest in the properties; in other words, they told me I could take it up with any one else I pleased, and I took it up with Mr. David Taylor in Denver, early in January, 1919. That brings the negotiations up to Mr. Taylor.

Q. Now later, did Mr. Taylor, pursuant to the

(Testimony of Howland Bancroft.)

property being put up to him by you, negotiate with the owners of the property, or the stockholders?

A. He did.

Q. And where did those negotiations take place?

A. I know that some of them took place in San Francisco.

Q. And were you present, I mean in San Francisco, during the negotiations?

A. I was in San Francisco during that period connected with the negotiations preceding the option, which was signed on the 16th of January, but I do not profess to be familiar with the terms.

Q. Did you have an interest in the deal with Mr. Taylor? A. I did. [178—174]

Q. What was that interest?

A. I was supposed to receive in lieu of professional fees for my services in connection with the examination then contemplated, a twenty per cent interest in whatever accrued to Mr. Taylor as profits, accrued to Mr. Taylor as a result of the successful examination of this property.

Mr. WHEELER.—(Q.) Was it a written contract? A. Yes, sir.

Mr. WHEELER.—Will you kindly produce it. (Witness produces paper.)

Mr. THATCHER.—(Q.) Is this which you have handed me the contract between yourself and Mr. Taylor relative to your proceeding in the deal?

A. Yes, this is a signed copy, and witnessed.

Q. And is that your signature, and that of Mr. Thane and of Mr. Taylor?

(Testimony of Howland Bancroft.)

A. Yes, sir, I know them all.

(A short recess is taken at this time.)

Mr. THATCHER.—If the Court please, we offer in evidence the contract between Mr. Taylor and Mr. Thane and Mr. Bancroft, by which their interests were determined.

Mr. COOKE.—No objection.

(The contract is marked Plaintiff's Exhibit No. 18.)

Mr. THATCHER.—(Q.) After the option was entered into, Mr. Bancroft, and this contract, which is Exhibit 18, did you go out and make an examination of the mine? A. I did.

Q. At whose request? .

A. At the request of Mr. Taylor.

Q. Did you make a report after your examination?

A. Following the examination I did, I made a report.

Q. Did you send that report to Mr. Taylor?

A. I did.

Q. I call your attention to Plaintiff's Exhibit 15, and ask you if this is the original report which you sent Mr. Taylor, I mean [179—175] the first report which you sent Mr. Taylor, and which you made? A. I made this report.

Q. As a result of your examination made of the mine? A. Yes.

Q. Will you state when you made this examination, and how long a time you were in making it?

(Testimony of Howland Bancroft.)

A. The examination was made between the 17th of January and the 27th of 1919.

Q. Will you state what you did in your examination; just go ahead and state.

A. During the course of the examination, the surface in the vicinity of the deposit was again examined, the first cursory examination of the surface having been made the preceding November; the underground workings of the mine as then developed, were inspected in a detailed way, and the samples which were to be cut were located and later taken.

Mr. WHEELER.—Pardon me; was Mr. Taylor present during this examination?

A. He was not.

Mr. WHEELER.—I move the evidence be stricken out, your Honor. All we are interested in now as to this January report is as to what was communicated to Mr. Taylor, and we know that the report itself was communicated; it is irrelevant and immaterial.

Mr. THATCHER.—One of the questions in this case will be the correctness and accuracy of that report. I presume, of course, that counsel is willing to admit that the report as made by Mr. Bancroft at that time, and as here offered in evidence as an exhibit, in this case, is accurate and correct, there is no question.

The COURT.—It seems to me it will be sufficient for you to let him testify in general that the report is correct, without going into details.

(Testimony of Howland Bancroft.)

Mr. WHEELER.—If Mr. Bancroft identifies the report, I know it is his best judgment, and correctly sets forth his views. [180—176]

Mr. THATCHER.—(Q.) Mr. Bancroft, is the report you there have, the result of your examination?

A. It is, absolutely, with the exception of these pencil marks which occur in various places throughout. I had no pencil marks in the report when I sent it on.

Q. And is the report the correct result of your examination? A. Absolutely.

Q. And is it a correct statement of the condition of the mine at that time?

A. To the best of my ability to determine it.

Q. After that, Mr. Bancroft, did you make any further examination of this property?

A. I did.

Q. I notice in the report is a map, or plane map, called Exhibit Number 5; have you a larger copy of that as originally made? A. Yes.

Q. Will you produce it. (Witness produces map.)

Q. What is the paper that you have there?

A. Well, this is Plate 5A, and this is Plate 5, so that this is not the same plate as the one you refer to.

Q. All right, I will come to that. Did you send to any of the defendants, or to the Nevada Humboldt Tungsten Mines Company, or its manage-

(Testimony of Howland Bancroft.)

ment, any assay plan of the mine, after you made your examination?

A. Just a moment, if you please. Do you wish this map to go in?

A. I have a larger map of this Plate 5, but that does not happen to be it—if you want to see it.

Q. Have you a larger map of that?

A. My original map of Plate 5, I have.

Q. Well, I don't care for that.

Mr. WHEELER.—That, I understand, is a photostat of your original map?

A. Yes, sir, a photostat production of the original tracing. I have the original map here, but not the tracing of the original map here; the photostatic production was made from the tracing of [181—177] the original map, but it is all an accurate record.

Mr. WHEELER.—(Q.) Is the map Judge David is holding, the original map?

A. That is a white print of the negative of the original tracing of Plate 5A, which was made following my examination in May, 1919.

Mr. THATCHER.—(Q.) In your report, Plaintiff's Exhibit 15, is Plate number 5—will you explain to the Court exactly what Plate number 5 is?

Mr. WHEELER.—Objected to on the ground it speaks for itself, and what the witness is now asked to explain to the Court could not have influenced the witness Taylor.

Mr. THATCHER.—It is merely so that the Court may understand the plate itself, and the readings

(Testimony of Howland Bancroft.)

on it; there are ambiguities in it that are patent, and which the witness can explain.

Mr. COOKE.—Unless they were brought to the attention of Mr. Taylor they are not material in this case; in other words, unless Taylor had the same understanding of it which the witness is about to state.

The COURT.—I don't see the necessity of it. The value of the mine at that particular time is not a question that will come in issue?

Mr. THATCHER.—Not at that time, except the character of the development work then existing. I am merely putting it in, if your Honor please, to show that certain lines on this map—for instance, these little lines, with the arrow running up, and the marking, .05 and 22, now without some explanation for the purpose of the record—

The COURT.—(Intg.) Oh, he may explain.

WITNESS.—It is a very simple matter; the samples are all indicated by these arrows. If the samples were taken from the roof, or the drift, for example, the arrow points to the point from which [182—178] the sample was taken. The same if the sample was taken from the floor. The first figure below the arrow-head, as indicated by the legend, is the width of the sample taken; the second figure is the percentage of tungsten trioxide; and that is the same throughout the report. The blocks of ore which are here designated, are included between these dotted lines; the material

(Testimony of Howland Bancroft.)

within these blocks is commercial ore, which has been valued; and the tabulation which occurs in this report, the method of calculation, is the method which is followed in good practice on such an ore body. I can explain that to you in detail, if you wish.

The COURT.—I don't think it is necessary, is it?

Mr. WHEELER.—It does not seem to be so.

Mr. THATCHER.—No, I will come to that a little later. I just merely wanted to explain that which don't affirmatively appear on the map itself.

Q. After you made this report, Exhibit 15, did you make any further examination of the mine?

A. I did.

Q. When, Mr. Bancroft?

A. According to my best recollection, I received a wire on the 14th of May, 1919, immediately after my return from Mexico, asking me to go to the mine.

Q. Did you go to the mine?

A. I believe I went to the mine on the 16th or 17th of May; I am not sure which date, and I am not sure it was either of those dates.

Q. How long did you stay there at that time?

A. Approximately a week.

Q. State what you did, and how, in making your examination?

Mr. WHEELER.—That is irrelevant, immaterial and incompetent, the condition of the mine the

(Testimony of Howland Bancroft.)

latter part of May; what the witness did, and the mine in its then condition, being a going concern, would not be evidence as to what its condition was on the 2d day [183—179] of April, or thereabouts.

Mr. THATCHER.—I think it would be very good evidence as to what the condition was, and the Court will see the report, or hear the witness' testimony as to what the examination consisted of, how it was made, the character of the workings which then existed. There can be no question but that examination showed accurately the condition, or approximately the condition, which existed on the first or about the first of April of that year, because of the very nature of the examination or character of the working, and the amount of development work, the stopes which existed, and the difference between the stopes as they existed upon the first examination and on the second, so that the difference will be almost insufficient as far as an ascertainment of the actual condition as it existed on April the 2d.

The COURT.—You may put the proof in, but it is the condition of the mine; I don't think there is any necessity of going into his method of doing it.

WITNESS.—Will you please tell me what you want?

Mr. THATCHER.—(Q.) Will you state what the condition of the mine was at the time you made your second report?

(Testimony of Howland Bancroft.)

A. The condition of the mine as at my second report is very clearly illustrated by Plate 5A.

The COURT.—(Q.) That shows the extent of all ore bodies? A. Yes.

Q. And assay values?

A. It does as at my examination of May, the report being transmitted on June 2d.

Mr. THATCHER.—(Q.) I call your attention to a paper marked "Plate Number 5A," and ask you if that is the plate to which you have just referred?

A. This is a larger copy of the plate which accompanies my report, or which was added to my report, and is a direct white print from a [184—180] negative of the tracing of my original field map; on this plate the coloring does not appear—in the plate which accompanies my report; the stopes and the workings are here shown in brown, as at the conclusion of my first examination; everything in brown existed, and its condition as here shown, at the conclusion of my first examination; the workings shown in blue are workings which were made subsequent to my first examination.

Q. Do they show the condition of the mine as it existed at the time of your second examination?

A. They do in so far as tonnage and average grade of the ore is concerned.

Q. Does that Plate 5A also contain on it figures or data which show the width of the vein or ore body, and the tungsten contents thereof, and the results of the sampling?

(Testimony of Howland Bancroft.)

A. It does at the point of each sampling.

Q. At the point of each sampling?

The COURT.—(Q.) Do I understand it shows the width of the ore body?

A. The width of the sample; each one of these figures, for example, represents a sample.

Mr. WHEELER.—(Q.) And the sample is taken right across the face of the ore body?

A. Across the roof, or across the floor; these samples happen to have been taken across the floor of the drift, for the reason the ore was reported to be coming in on the floor, and not on the roof.

The COURT.—(Q.) Do I understand those figures represent not merely the width of the drift, but the width of the ore body?

A. Those figures represent the width of the sample I cut, which was then obtainable in the workings.

Mr. WHEELER.—(Q.) The proposition is, if you take across the floor as you find it, it would necessarily require that the floor exactly fitted the ore body? [185—181] A. Exactly.

Q. And if it did not for any reason exactly fit the ore body, then your sample would not show the width of the ore body.

A. It would not; and the samples here taken are the maximum widths obtainable within the workings. Where the samples are evidently considerably narrower than an ordinary working, it is not proved that the entire ore body is there sampled,

(Testimony of Howland Bancroft.)

because some of the ore body may have been in one of the walls, either in the footwall or in the hanging-wall; in my notes which accompany my samples, the hanging-wall and footwall were noted as exposed, or not exposed, so that in my calculations later, I have had an opportunity to determine whether or not this is a fair representation of the ore that may be expected in this mine.

Mr. THATCHER.—(Q.) Now on this examination which you made on the 17th, state what you did with reference to examining the workings, in taking samples and making computations as to the amount of ore available, blocked out, or indicated, as may be, in the mine.

The COURT.—Is there any necessity of going into anything more than his results?

Mr. THATCHER.—If they don't object.

The COURT.—It can be taken up on cross-examination.

Mr. WHEELER.—It seems to me the telegram gave his best opinion, and we believe him to be a gentleman whose opinion is correctly stated in all circumstances.

Mr. THATCHER.—I move to strike that out as not evidence in this case, I must say counsel makes a good witness, but I would like to finish my examination, and find out what the facts are.

Q. Mr. Bancroft, as the result of your examination did you make a report to Mr. Taylor?

A. I did.

(Testimony of Howland Bancroft.)

Q. Was Plate 5A a part of your second report, or supplemental report? A. It was. [186—182]

Q. Did you also give him any written statement to accompany Plate 5A.

A. I gave him first a wire addressed to San Francisco; second, a letter, I believe occupying one page, in which the wire was quoted and in which the tonnage was tabulated, and the average grade and total tonnage was accounted for.

Q. I call your attention to what appears to be a letter on the letter-head of Howland Bancroft, consulting mining geologist, of June 2d, 1919, and ask you if that is your final and supplemental report on the mine? A. It is.

Q. Is that report correct, a correct statement of the conditions of the mine as it existed at the time of your second examination? A. It is.

Mr. WHEELER.—The objection is made at this point that the examination was made in the month of May, some time subsequent to the 2d day of April, the date with which we are here concerned; that the mine is shown by the evidence to have been a going concern, and the condition of the mine at the time of the examination by the witness is not shown to have been identical with its condition on and prior to April 2d; therefore, it is incompetent, irrelevant and immaterial, as much so as if ten years had passed.

The COURT.—I think I will allow the testimony.

Mr. THATCHER.—I offer in evidence Plate 5A

(Testimony of Howland Bancroft.)

and the supplemental report, and ask that they be attached together and considered as one exhibit.

(Q.) Is that paper you hold the one you sent with the report, accompanying the report?

A. I could not swear to that. It is a copy of Plate 5A; I do not know whether it is the one I sent to Mr. Taylor or gave to you, but it is a true copy of Plate 5A.

Mr. THATCHER.—I would like to have these two attached together and made one exhibit.
[187—183]

(The Supplementary Report and Plate 5A are marked Plaintiff's Exhibit No. 19.)

Mr. THATCHER.—I offer in evidence also this other plate, Plate 5A, which is colored, and identified and testified to by the witness.

Mr. WHEELER.—That is objected to as incompetent, irrelevant and immaterial; it does not appear that it was communicated to David Taylor.

Mr. THATCHER.—This shows the condition of the mine.

The COURT.—Was it ever communicated to David Taylor?

Mr. THATCHER.—No, sir; as it stands in its present condition, it was not communicated to David Taylor at any time during any of the matters in controversy; but I am offering it for the purpose of showing, for the convenience of the Court, the workings as they previously existed on his first examination, and as they existed upon the second

(Testimony of Howland Bancroft.)

examination; and for the further purpose of showing from the first examination made in January, and to be used in interrogating the witness, what the conditions of the mine were on or about April 2d, at the time of the representations complained of; that is the purpose of it.

WITNESS.—May I make a suggestion?

The COURT.—You may make your suggestion to counsel, if you wish.

WITNESS.—This exhibit simply clears up having to study Plate 5 and Plate 5A, which are on separate pieces of paper.

The COURT.—Well, if it was not communicated to Mr. Taylor, I don't see its relevancy at this time; but you may have it in for illustrative purposes, and that, as I understand, is your idea.

Mr. COOKE.—We would like to have the same objection as was urged by Mr. Wheeler to the June 2d report of Mr. Bancroft, considered as made to this also, on the ground it relates to conditions after April 2d.

The COURT.—I am rather in doubt about that, but I will allow you to put it in. [188—184]

Mr. WHEELER.—To make our objection specific, we urge it as hearsay.

(Plate 5A is marked Plaintiff's Exhibit No. 20.)

Mr. THATCHER.—(Q.) Mr. Bancroft, I call your attention to this plate 5A, also call your attention to your first report, Plaintiff's Exhibit 15, to your second report, which is Plaintiff's Exhibit

(Testimony of Howland Bancroft.)

Number 19; I would like to ask you whether or not as a mining engineer, and based upon your experience and the examinations which you made, more ore could have been blocked out or indicated in the workings and mines of the Nevada Humboldt Tungsten Mines Company on April 2d, 1919, than at the times of the making of your second report?

Mr. WHEELER.—Objected to as calling for the opinion and conclusion of the witness, and not relevant in the case.

Mr. THATCHER.—His qualifications have been admitted.

Mr. COOKE.—It is not a proper subject of expert testimony, and argumentative.

Mr. THATCHER.—I think it is a proper subject of expert testimony, and based upon the results of the facts as he ascertained them.

(Discussion.)

The COURT.—If the witnesses, for instance, had testified there was a shaft there forty feet deep, and his subsequent examination showed there could not have been any shaft there over twenty feet deep, it seems to me he would be permitted to show that fact, and that it would contradict the statements made by the witnesses. I don't think the admission of this testimony is absolutely clear, but I will allow it in, and counsel may have an exception.

WITNESS.—Will you please repeat the question.

(The reporter reads the question.)

(Testimony of Howland Bancroft.)

A. Why, it could have. [189—185]

The COURT.—Wait a moment. The time of the second report was in May, and the time of the first report was earlier, and your question is whether more ore could have been blocked out at the time of the first report than at the time of the second report?

Mr. THATCHER.—No, sir. My question is whether or not there could have been more ore blocked out or indicated on April 2d, than there was shown at the time of the second report, based upon the examination which he had made on both occasions.

The COURT.—Well, that amounts to simply this, That there could not have been any more ore in April than there was at the time of the last report.

Mr. THATCHER.—Yes, sir.

The COURT.—Well, that is self-evident, isn't it?

Mr. THATCHER.—Well, counsel thinks not. He was just objecting a few minutes ago to the use of the report itself upon the ground it didn't show the condition or amount of ore blocked out on April 2d. I am merely asking that one question.

The COURT.—Well, you may answer the question.

WITNESS.—It is difficult to answer your question in the way you have put it; but I assume that you want to know if more ore could have been developed had none of it been stoped?

Mr. THATCHER.—No, my question is this:

(Testimony of Howland Bancroft.)

Based upon your experience as a mining engineer, upon the examination which you made of the property in January, 1919, and upon the examination of the property and its workings as they existed and were shown in May, 1919, will you say in your opinion as a mining engineer, whether or not more ore could have possibly been blocked out or indicated on the 2d day of April than at the time of the making of your second report?

A. Well, I will say it was not. [190—186]

Q. Mr. Bancroft, did you send Mr. Poole any copy of your report? A. I did not.

Q. Did you send him any copy of part of your report?

A. I sent a copy of Plate 5 to Mr. Poole at Lovelock.

Q. Shortly after making the first examination?

A. After the completion of my first examination.

Q. Did you give to any other person connected with the company any copy of your recommendations of the plan of development incorporated in your first report?

A. I sent two copies of the Nevada Humboldt Tungsten Mines Company at Mill City, Nevada, which copies were acknowledged by Mr. Morrin.

Q. Did you send any other copies to anyone else?

A. Only to Mr. Poole.

Q. Did you at any time discuss the development plan of the mine with Mr. Poole? A. I did.

Q. When and where?

A. The first time I recall discussing the develop-

(Testimony of Howland Bancroft.)

ment plan with Mr. Poole was on the train the day after we had left San Francisco; we left on number 6, as I recall it, in the evening, and just before Mr. Poole got off at Lovelock, I believe we discussed very briefly the matter of the development which would be required in the mine. I then proceeded to the mine, and discussed at some length later with Mr. Morrin the proposed development program; and Mr. Morrin in turn discussed that with Mr. Poole, and I later discussed it with Mr. Poole. The development program proposed is indicated in my report on page 10, which contemplated sinking the shaft an additional 360 feet, continuing level number 2, driving levels 3, 4, 5, and 6, 380 feet to the southwest, and 250 feet to the northwest, and connecting these levels by raises.

Q. Do you recollect when you discussed these matters with Mr. Poole and Mr. Morrin, or about when? [191—187]

A. My recollection is that I discussed that with Mr. Morrin probably every day at the mine during the first examination.

Q. During the first examination?

A. Yes, I didn't spend all day doing it; we chatted about it.

Q. And with Mr. Poole, was that also during the first examination?

A. Mr. Poole arrived, according to my best recollection, either the second day before I left or the last day before I left, and we had a brief discussion about this program.

(Testimony of Howland Bancroft.)

Q. Have you any interest in the litigation now pending, Mr. Bancroft? A. I have not.

Q. Have you any interest in the contract which has been offered in evidence here?

Mr. WHEELER.—It seems to me we have so abundantly admitted the qualifications of this witness, it is not necessary to show lack of interest in the matter; we have admitted that he is a gentleman worthy of belief.

The COURT.—Well, he has already stated he has no interest; that covers the whole matter, doesn't it?

Mr. THATCHER.—I just merely wanted to identify the contract.

Q. You have no interest in the property or the litigation, or any matter connected with it, pursuant to any contract, or the contract which has been offered in evidence, and made Plaintiff's Exhibit 18? A. I have not.

Mr. THATCHER.—That is all. You may cross-examine.

Cross-examination.

Mr. WHEELER.—(Q.) Mr. Bancroft, what method was employed in this mine, if you observed it, when you visited it in January, 1919, in the matter of estimating values of ores; were fire assays used by the company, or pannings made?

Mr. THATCHER.—Objected to as not cross-examination. I didn't [192—188] ask him anything about the methods used by the mine or the management for the ascertainment of values.

(Testimony of Howland Bancroft.)

Mr. WHEELER.—I submit that the witness made an examination of the mine.

The COURT.—I think there would be no question about your going into those matters so far as the correctness of his report is concerned; but the assays that were used in the mine would not go to the correctness of any testimony he has given, would it?

Mr. WHEELER.—I submit the question, your Honor.

The COURT.—I will sustain the objection.

Mr. WHEELER.—(Q.) Mr. Bancroft, you were interested in the result of this option, and you laid out some work to be done; in the course of your conversations and laying out the work that was to be done was anything said or anything observed by you as to the method of estimating values as work in the mine progressed, or was intended to progress?

Mr. THATCHER.—Objected to as not cross-examination.

The COURT.—Objection sustained.

Mr. WHEELER.—Exception.

Q. Did you give any instructions or directions, or make any suggestions as to what should be done in the matter of estimating values of ores as the work in the mine which you laid down or advised, was proceeded with?

Mr. THATCHER.—Objected to as not cross-examination. The testimony of the witness is that he laid out a course of development work in the

(Testimony of Howland Bancroft.)

mine; nothing was said as to the ascertainment or determination, or how they should determine the value of the ore in the mine.

The COURT.—I will sustain the objection.

Mr. WHEELER.—(Q.) When you examined this mine in the month of May, 1919, you sent a preliminary report, it appears in which you [193—189] made an estimate of 40,000 tons of ore?

A. I sent a telegram.

Q. A telegram?

A. I would not call it a preliminary report.

Q. Very well. At any rate, that was before you had had any assays made? A. Yes, sir.

Q. And you also had previously said in the telegram that it would be absolutely necessary to have assays made? A. Yes.

Q. That is a matter that is very obvious, is it not, to anybody familiar with mines?

A. It should be.

Q. Now, with reference to your estimate of 40,000 tons in that telegram; that, I take it, was based upon what you saw when you were in the mine, supplemented by figures which you made, based upon the workings as you found them in May, 1919?

A. The estimate of tonnage.

Q. The estimated tonnage? A. Yes, it was.

Q. In order to make that estimate you examined, I suppose, the faces and the walls, the floor and the roof in the workings that you visited?

A. I examined all of the new workings that were accessible.

(Testimony of Howland Bancroft.)

Q. And in so examining them you saw with your eye what appeared to be ore, did you not?

A. In some places I was very much surprised when I got the results of the samples to find that the tungsten content was as low as the sample indicated.

Q. In other words, it looked to your eye very much better than the assaying results showed?

A. In places, yes.

Q. In places; but in making this estimated tonnage you based it upon what appeared to your eye to be ore?

A. I based that estimate on what I hoped to be ore; I cannot swear that it appeared to be ore; I know that I hoped that it would be ore; I cannot swear that it appeared to be ore, because a lot of that material in the shaft below the floor level looks like very good ore, and it contains practically nothing; in that instance on [194—190] what appeared to be ore, and I say that because I can recall that specifically.

Q. At any rate, it looked good enough to you to make a preliminary estimate of the tonnage that was there, provided the assays showed contents of 1.4?

A. The average assay of the blocks as the result of my second examination was 1.64 tungsten trioxide.

Q. What is the difference in the parlance of your profession between 1.46, or the figure you have just mentioned, which you were working to, and

(Testimony of Howland Bancroft.)

1.75; is it merely the difference between $1\text{--}3/4$ and the $1\text{--}4/10$, or approximately that?

A. 1.75 of course is $1\text{--}75/100$ per cent, and 1.64 is $1\text{--}64/100$ per cent, the difference is $11/100$ of one per cent.

Q. And which is the high? A. 1.75.

Q. What was your purpose in taking a sample entirely across the wall or face, or wherever you took the sample—floor, we will say, of the wall or the roof. A. In each instance?

Q. Yes.

A. I took samples across the entire width of the working in the event that that width did not exceed six feet; in the event that width did exceed six feet, which was true in a few instances, I took two sections, so that I believe I have no sample which was more than six feet wide; so that your inquiry would not be applicable to those samples which were taken in sections.

Q. Say the samples of each character, but you think there are none that would average more than six feet, or that would be more than six feet?

A. I think I have no record of a sample more than six feet wide.

Q. Why did you sample across the entire six feet; why not take one portion of the first six feet, within the first few inches or the first foot?

A. I did in a great many instances.

Q. You did that in a great many instances, in addition? [195—191]

A. Yes—well, I would not say in addition. For

(Testimony of Howland Bancroft.)

example, here is a sample 2.8 feet wide; presumably that is not the entire width of the working.

Q. On the other hand, it may have been all that was opened there, may it not?

A. It may have been, but presumably both walls were exposed, and there would be no object in taking bare material and adding it to the sample.

Q. But where both walls were exposed for six feet, or more than six feet, why did you take a sample across the entire face or floor or roof; why not under those conditions take a sample in the first foot and stop?

A. Well, if there was evidently noncommercial material, barren waste, that was not included in the sample; if that material was undisturbed in the ore, it may have been included in the sample, and probably was.

Q. But you apparently don't see what I want. You took a number of pieces of rock from each foot across where you took your samples, didn't you?

A. I cut my trenches approximately from three and a half to four and a half inches wide, one and a half to two and a half inches deep.

Q. Now my question is why did you go with a trench six feet long, instead of making it five or six or seven inches long?

A. My average was decidedly under six feet.

Q. In other words, you were looking for the average, and you knew it was a proposition that

(Testimony of Howland Bancroft.)

might show too rich ore if you confined your sample to a few inches or one or two feet?

A. No, decidedly not.

Q. Then why?

A. I was looking for mineable ore.

Q. And you wanted to get an average of what was there, as it was exposed; is that not right?

A. That is the object of sampling.

Q. And if you did not take your sample in that thorough way across the entire face, floor, wall or exposure, you might get a result [196—192] which would show too rich a result, isn't that it?

A. If I didn't do that I would not get an average of the ore there exposed.

Q. Exactly; with the result that for example, it might show 2.5, when in reality if you took clear across the whole trench, as you took it, it might show one, is not that it?

A. I have some samples which may have averaged more than 2 per cent.

Q. Averaged one and two per cent?

A. Averaged more than two per cent.

Q. I think you misapprehend my question; it is perhaps too obvious, and does not require a reply.

A. I am not trying to evade you, I will tell you that.

Q. I know that perfectly well. I want to get at the reason for taking these six foot trenches, and taking an ore sample from that, and having your assay made?

A. Leaving out the six feet, because my average

(Testimony of Howland Bancroft.)

is under six feet decidedly, you want to know the object in taking the samples?

Q. Why take them clear across, why not take simply an inch or two of trench, instead of taking six feet of trench?

A. The ore body as mined was demonstrated to be considerably more than an inch or two wide.

Q. Again I think you misapprehend. Just imagine you are standing facing the ledge or the vein, the hanging-wall and the foot wall; now you take a sample across that, and we will call it six feet, why I say, do you take the sample to get your spoil from a trench that is six feet wide, going from wall to wall, instead of taking only a foot?

A. Well, a foot would have nothing to do with the balance of the five feet.

Q. Exactly; and it might be if you so took your sample, that you [197—193] would find a very high or very low result, which would differ entirely from the average which you would obtain if you took the spoil from the entire six feet?

A. That would not be good sampling practice.

Q. Of course it would not be good sampling practice, we all know that. Read the question, please.

(The reporter reads the question.)

A. If I took samples from a part of an exposure that result would undoubtedly differ from the result of the entire exposure of the ore body.

Q. Exactly; and it is quite possible that you would take a sample which would average one, or less than one, when you took your spoil from the

(Testimony of Howland Bancroft.)

entire six feet, whereas if you took your sample but from one foot of a similar trench the assay might run to 1.75 or two, or even more? A. It might.

Q. Now I want to ask you with regard to the panning practice in mines, tungsten mines as well as others; that consists in what, refining?

Mr. THATCHER.—I object on the ground it is not cross-examination.

Mr. WHEELER.—If there is any question, we will make the witness ours.

The COURT.—Very well; I think for that line of questioning you may make the witness yours, if you wish to.

A. The panning practice, I believe as most expertly practiced is the vanning method, which is accomplished by Cornishmen in the Cornish tin mines, and that is accomplished on a van shovel; and that work in the hands of an expert is frequently quite accurate. The vanning would be comparable in a way to panning, although I believe from the records of my own assistant engineers that I have had [198—194] vanning and panning at great length in Bolivia, the panning is not nearly as accurate as vanning.

Q. In order to even approximate the method that you adopt in practice of cutting a trench and taking a spoil, it would be first necessary to cut a similar trench and take a similar spoil, and place in what you would call the pan, would it not?

A. To approximate the same results, yes.

Q. So unless a man who was following the pan-

(Testimony of Howland Bancroft.)

ning process cut trenches six feet on an average where the vein was wide enough, or less than six feet where the vein was not wide enough, there would be no necessary approximation between your result and the results which he would obtain, would there?

A. I can even go a little stronger than that; unless he cut his samples in approximately the same samples, in the same widths which I used, his results would not approximate.

Q. That is exactly the proposition which I wish to bring out. I now return to the cross-examination. When were you first asked after your January examination and your February report, 1919, to visit this property?

A. My recollection is that Mr. Taylor asked me—Mr. David Taylor asked me to come to Denver, and I believe asked me to stop off at the mine en route; I am not sure of it, but if my correspondence will show that I can answer your question.

Q. It will show it?

A. If it does; I have not reread it.

Q. Examine it, please, with Mr. Taylor, because we want to fix those dates.

(At 12:00 o'clock a recess is taken until 1:30 P. M.)

AFTER RECESS—1:30 P. M.

Cross-examination of Mr. HOWLAND BANCROFT Resumed.

Mr. WHEELER.—(Q.) I asked you concerning some correspondence, [199—195] will you give

(Testimony of Howland Bancroft.)

me the results of your examination as to when you were again asked to examine this property?

A. Asked to again examine it, or again to go to the property?

Q. Again to go to the property.

A. I found a letter, I think it has a date of March 14th.

Q. Having refreshed your recollection, would you give us the date?

A. I think it is March 14th, but it is right on the letter.

Q. What you have refreshed your recollection from is the following passage in a letter received by you from David Taylor—

Mr. THATCHER.—Objected to as not cross-examination.

Mr. WHEELER.—Oh, yes it is. (Q.) At any rate, you received the request, and now you say at about what date?

A. March 14th, the letter was written; I do not know when that letter arrived, because I was in Arizona, later in San Francisco, and later in Mexico.

Q. When were you next after March 14th to visit the mine?

A. My best recollection is the 14th of May.

Q. What time did you return from Mexico in the month of March?

A. I did not return in the month of March at all.

Q. The letter you referred to must have been received by you after your return from Mexico?

(Testimony of Howland Bancroft.)

A. Well, that is difficult for me to say; I would have to see the letter to see where it was addressed, and then it would be a surmise as to whether that was forwarded to me in Arizona or in San Francisco.

Q. At any rate you did the first portion of April return from Mexico, didn't you?

A. No, I went to Mexico on the 5th of April.

Q. And you were unable to visit the property before going, is that it? A. I was unable to.

Q. Under the contract offered here in evidence, you were to have an interest in these properties; did you have any interest in the option of April 2d; I say the option, under the contract exhibit "C"? [200—196]

A. I assume I was to have the same proportionate interest in the April—well, in the April agreement.

Q. Was that matter subsequently changed? It appears that you no longer have any interest in the matter.

A. I refuse to testify as an expert for anybody as an interested party, so I changed my relationship, and was paid for my time during the examinations of the mine, and no longer am interested in the property.

Q. When was that change made? A. Actually?

Q. Yes.

A. About the 29th of March of this year.

Q. Of this year? A. Yes.

Q. So that up to the 29th of March, you contin-

(Testimony of Howland Bancroft.)

ued to be an interested party? A. I did.

Q. Prior to that time, however, the services you had rendered had been rendered pursuant to the original arrangement, and up to that time had not been a matter of bargaining between you?

A. No.

Q. In other words, up to March of this year, you had expected to contribute your services in examining the property, pursuant to the original agreement?

A. No, I had not. I agreed to make one examination, which I proceeded to make in January, 1919.

Q. Was it not a matter of some dispute or discussion between you and Mr. Taylor as to whether you were not obligated to make more than one examination?

A. There was some discussion about the matter.

Q. When did that take place?

A. The discussion about the matter, I believe, took place in the summer of 1919, the summer or fall.

Q. Was there not some question upon that subject prior to your going to Mexico?

A. I think not, prior to my going to Mexico.

Q. Are you positive about that, Mr. Bancroft; I would like you to be very clear. [201—197]

Mr. THATCHER.—I suppose prior to going to Mexico, you mean April, 1919?

Mr. WHEELER.—I am referring to the trip that he took in April, 1919, yes.

WITNESS.—I think there was not.

(Testimony of Howland Bancroft.)

Q. But there was a request made of you to go and examine the property prior to that time, wasn't there, or to stop off there?

A. Yes, as evidenced by the letter.

Q. And you received that letter sometime before you went to Mexico on the 5th of April?

A. I think I must have.

Q. And what route did you take on going to Mexico; did you come by the way of San Francisco?

A. I was examining a property in Arizona, a tungsten mine, it happened to be, at the time this letter was written; I concluded that examination on the 28th of March, 1919, and proceeded direct to San Francisco; my clients, who were going to Mexico with me, desired to sail on the 1st; they put their sailing off until the 5th, providing I would then accompany them, and I accompanied them on the 5th, having arrived in San Francisco the night of the 31st or morning of the 1st, or thereabouts; I did not go back to Denver.

Q. The request, however, was made of you to visit the property on your way out to San Francisco?

A. I believe the conclusion was I was to stop at the property on my way to Denver, it then being supposed I would return to Denver before going to Mexico.

Q. Now, subsequently, in the summer or fall, you had some discussion with Mr. Taylor, and the purport of the discussion was that he considered you were bound under your arrangement, to make

(Testimony of Howland Bancroft.)

more than the first examination of the properties, and that you were not entitled to compensation for your examination made in May, is that not true? [202—198]

A. No, we had no discussion about that; I made the examination in May under the same conditions that I made the examination in January.

Q. That is to say you were—

A. (Intg.) While an interested party.

Q. You were an interested party, and to be compensated out of the 20 per cent which you expected to get? A. Precisely.

Q. And it had been understood you would examine the property in the event of any change in that option, had it not?

A. I don't know whether it was understood or not; I did not understand I was to be called upon indefinitely to continue to go to that mine.

Q. However, Mr. Taylor said that was his understanding, didn't he?

A. He did, but he was decidedly mistaken.

Q. I understand. Did he not claim to you he was intending to rely on you, and that was why he had given you the 20 per cent?

Mr. THATCHER.—Object on the ground it is not cross-examination as to what Mr. Taylor's reliances are on Mr. Bancroft; there is no testimony here by this witness as to whether he did or did not rely.

The COURT.—These questions are going simply to the witness' interest in this litigation?

(Testimony of Howland Bancroft.)

Mr. WHEELER.—Precisely. When the interest began and how long it lasted.

Mr. THATCHER.—I don't object to any testimony as to the witness' interest, how long it lasted or what the character; but the question as I heard it went to the effect that Mr. Taylor was relying upon Mr. Bancroft, and called for the conclusion of the witness, and upon entirely different subject-matter, on the question of reliance.

The COURT.—I don't see how that shows his interest in this litigation; it might show Mr. Taylor's interest. [203—199]

Mr. WHEELER.—It would show Mr. Taylor's conception of the past relations, and it would then be for the Court to say whether at that particular time he was interested. The witness understands he was not interested to the extent that he was to make an examination of the mine the second time.

The COURT.—He says he did make it the second time, under the same conditions as the first; and he did it under the theory that he was interested in the property; and those examinations were made prior to his parting with his interest in it, were they not?

WITNESS.—They were.

The COURT.—I think I will sustain the objection to that question.

Mr. WHEELER.—(Q.) You had certain photo-stats made of a map, one of which you annexed to the report which you gave to Mr. Taylor in January or February, 1919; do you remember how many

(Testimony of Howland Bancroft.)

copies you had made? A. Of the Plate 5?

Q. Yes.

A. I do not know the exact number, but I can account for ten.

Q. And you had some extra copies in your office in Denver, did you not? A. Yes.

Q. And your office really was an office that was immediately adjoining, or was occupied by you in common with Mr. Taylor at that time, wasn't it?

Mr. THATCHER.—Objected to as not cross-examination.

Mr. WHEELER.—This is on the map, your Honor.

Mr. THATCHER.—It is apparently not for the purpose of testing this witness' statement on the witness-stand.

The COURT.—Oh, I will allow that question.

A. Not occupied in common with Mr. Taylor.

Mr. WHEELER.—(Q.) They were adjoining rooms?

A. Mr. D. W. Brunton, Mr. F. M. Taylor, Mr. D. R. C. Brown, Mr. [204—200] David Taylor and I, had a suite of offices in Denver; mine was one of the suite.

Q. These photostat copies were there?

A. Yes, in one of my map cases.

Q. They were there where they were accessible, were they not?

Mr. THATCHER.—Objected to as not cross-examination.

The COURT.—I will sustain the objection to that.

(Testimony of Howland Bancroft.)

Mr. WHEELER.—(Q.) Mr. Taylor referred to by you, is the father of the plaintiff. A. Yes.

Q. What relation did your room bear to the plaintiff's office?

Mr. THATCHER.—Objected to as not cross-examination.

The COURT.—The objection will be sustained.

Mr. WHEELER.—(Q.) Well, we will make the witness ours for this purpose, your Honor, as he is going away.

The COURT.—Very well.

Mr. WHEELER.—(Q.) What was the location of your office with regard to the office of the plaintiff Taylor?

Mr. THATCHER.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—I will allow that question.

A. Mr. David Taylor's office had one wall which was also one wall of my office; in other words, they fronted on a passage-way and were entered from the passage-way by different doors, and had no doors which opened between.

Mr. WHEELER.—(Q.) Was there any drafting table in your office?

A. My map case is arranged with a drafting table on top of it, but it has not been so used to my knowledge.

Q. You have a library of technical books in your office? A. A large one.

Q. As a matter of fact, were the two offices accessible to each of [205—201] you, or was your

(Testimony of Howland Bancroft.)

office an office that was locked while you were away?

A. I doubt if it was locked, but it was my private office; it don't belong to anybody else.

Q. Whether or not it was locked and not accessible while you were away, you do not know?

A. I do not know.

Q. Did you yourself lock it when you were away?

A. I locked my files.

Q. Locked your files? A. Yes.

Q. But not the office itself? A. Not the office.

Q. And there would be no difficulty in getting from one of the other offices then, into yours?

A. Oh, no, there was free access.

Q. Examine exhibit 15, if you please.

The COURT.—Is he still your witness?

Mr. WHEELER.—Yes. It does not make any difference.

Q. Exhibit 15 is the Bancroft report, so called; state whether or not that is the original report as signed by you, and whether you know that is the original map annexed thereto. I will resume the cross-examination in asking this question.

The COURT.—You go back to the examination in chief?

Mr. THATCHER.—I would like to ask a question in cross-examination of the direct. (Q.) You had a suite of offices all there together, yourself, Mr. Brunton, Mr. F. M. Taylor and Mr. David Taylor? A. And Mr. D. R. C. Brown.

Q. And Mr. D. R. C. Brown. Mr. David Taylor

(Testimony of Howland Bancroft.)

used offices with Mr. F. M. Taylor at that time, did he not, or do you recollect?

A. I knew nothing about that.

Q. Your office was open and could be used by any one there at any time they wanted to, could it?

A. Yes.

Mr. THATCHER.—That is all.

Mr. WHEELER.—I am now resuming the cross-examination. [206—202]

WITNESS.—There is no doubt about this text, absolutely no doubt about it; this is on my own paper.

Q. As to the text there is no doubt; how as to the map annexed thereto?

A. I make the same qualification that I made this forenoon regarding the addenda in pencil.

Q. That qualification is referring to the text and not referring to the map? A. Yes.

Q. Now, please refer to the map and state whether or not you are prepared, without qualification, to say that that is the map as originally annexed with some addenda now placed upon it, not a duplicate and not a similar photostat, but whether it is the precise document?

A. This would lead me to believe that it is, because these maps were put in these covers, and certainly the map which was put in the original had these pointers on the back of the map.

Mr. WHEELER.—I move to strike out that portion of the answer, "This would lead me to believe," and from there forward.

(Testimony of Howland Bancroft.)

Mr. THATCHER.—I think that is very responsive to the question.

The COURT.—That may go out.

WITNESS.—I could not swear to that, as I have no mark of identification on this particular map; I can, however, swear that the photostat here is a copy of my Plate 5.

Mr. WHEELER.—(Q.) Yes, I understood that, but I was talking now with regard to this particular instrument. I think I have your answer. When you made your first inspection of this property you had some written report, had you; that is, prior to the report of January or February, 1919?

A. Yes, I had a report by Mr. Hyder.

Q. Did you yourself make any report at that time, or any statement regarding the property?

A. I did, but not to Mr. Taylor.

Q. Did that statement or report come to the observation of Mr. Taylor?

A. I think not. [207—203]

Q. Did Mr. Hyder's report come to the observation of Mr. Taylor?

A. Presumably; I do not know.

Q. What became of Mr. Hyder's report?

A. I have it.

Q. We would like to inspect it, and counsel I am sure will not take up your time or ours, but regard it as sufficient identification in case we want to use it.

Mr. THATCHER.—I have no objection.

Mr. WHEELER.—(Q.) Did you make any oral

(Testimony of Howland Bancroft.)

reports to Mr. Taylor at any time with regard to this property, or discuss the property with him at any time subsequent to the report of your inspection made in January or February? A. Yes.

Q. When?

A. I cannot tell you the actual dates, but I certainly discussed the property with him on a number of occasions.

Q. In the months of February, March and up to the 5th of April, 1919.

A. It must have been prior to the 10th of March, because I left Denver on the 9th, I believe, of March, and did not return until the 29th of May.

Q. When did you first hear or learn of the contract, exhibit "C," of the 2d of April?

A. I am not sure that I have ever seen that.

Q. When did you first hear that such an option had been obtained, or such a contract?

A. I must answer that with qualifications, because I am not certain of this.

Q. When did you first hear that a modified arrangement had been made?

Mr. THATCHER.—Object on the ground it is not proper cross-examination. I don't think I asked this witness a question concerning the second contract; I asked him with reference to the first.

Mr. WHEELER.—He was to participate in it, and was interested at that time, and we want to know when it was first communicated to him.

(Testimony of Howland Bancroft.)

The COURT.—I will allow the question.

A. I knew an arrangement had been made.

Mr. WHEELER.—(Q.) From whom did you learn it?

A. Mr. David Taylor sent me a telegram, but I am not sure that he specified the contract; in fact, I do not remember what he said in the telegram.

Q. Have you a copy of the telegram?

A. Probably.

Q. I would like to have it please.

(The telegram is handed to counsel for defendants.)

Q. Is the telegram dated April 3d, signed David Taylor, the telegram you have just referred to which gave you the information? A. It is.

Mr. WHEELER.—We offer it in evidence, and ask that it be marked out Exhibit "O."

Mr. THATCHER.—We object on the ground it is incompetent, irrelevant and immaterial, and not proper cross-examination.

The COURT.—It is the question as to his interest in the property and in the deal. It will be admitted.

(Telegram dated April 3, 191—, from David Taylor to Howland Bancroft is marked Defendant's Exhibit "O.")

Mr. WHEELER.—I will read it. (Q.) It was April, 1919, that you received it, was it not?

A. Yes.

Mr. WHEELER.—(Reads: "Denver, Colo., 313 P April 3 191. Howland Bancroft, Care B. L.

(Testimony of Howland Bancroft.)

Thane, Crocker Bldg., San Francisco, Calif. Have closed alternative option whereby I am to raise funds to liquidate corporation indebtedness as seven per cent preferred stock redeemable from first profits netting company minimum ninety-five. Company to be reorganized or assets transferred to new corporation as required by me I receive sixty-two per cent common stock interest present owners receive thirty-eight per cent. [209—205] Sufficient interest to place preferred stock must be supplied from my share. Option still in effect as alternative but both options expire June sixteenth Wrote Thane yesterday enclosing copy new agreement. David Taylor.”

Mr. WHEELER.—Have you gentlemen a copy of the letter from Mr. Thane referred to therein?

Mr. THATCHER.—I will have to look, Mr. Wheeler.

Mr. WHEELER.—(Q.) When after receiving that telegram did you next see Mr. Taylor, plaintiff herein? A. The end of May, 1919.

Q. Not until after you had made the examination of May? A. No.

Q. Did you have any correspondence with him touching this proposition, or an examination to be made by you, including any telegrams or any telephonic communications, intermediate to those periods, other than those introduced in evidence here this morning?

A. I acknowledged the receipt of his wire by

(Testimony of Howland Bancroft.)

letter. The next communication which I recall from Mr. Taylor was the 14th of May, which was a telegram.

The COURT.—Was this telegram last introduced, offered for any other purpose than to show the interest of the witness in the deal?

Mr. WHEELER.—It is offered, your Honor, to show the interest of the witness in the deal; we claim it to be admissible for that purpose. I understand the rule to be that unless there is a limitation placed upon evidence that is offered, that it is in the case for every purpose for which it is relevant. It might be, and is possible, that it would be an item tending to show in addition to the matter of the interest of the witness, the relations of the parties, from which we might ask your Honor to infer that they were such that Mr. Taylor was probably depending upon Mr. Bancroft at this time.

The COURT.—Well, I think it will be admitted for the purpose [210—206] for which it was offered; that is, to show the interest of this witness in the litigation.

Mr. WHEELER.—If it is to be confined to that, it could never be used for any other purpose by us in the case, according to your Honor's ruling.

The COURT.—I am rather in doubt about its being admissible for any other purpose, over the objection of counsel.

Mr. WHEELER.—Then if that is so, your Honor, we ask for the benefit of an exception.

(Testimony of Howland Bancroft.)

The COURT.—Of course that ruling is made on the theory it is not cross-examination, and therefore it is admitted with that limitation, simply because it is not cross-examination. I am not holding that that testimony would be irrelevant by any means.

Mr. COOKE.—Why not have the witness our witness for that purpose, and remove the restrictions.

Mr. WHEELER.—It is immaterial to me how it comes in, on cross-examination or as a part of our case.

Mr. THATCHER.—I object to it now as not cross-examination.

Mr. WHEELER.—If you object to it as not cross-examination, then for a moment the witness can be deemed ours, and we offer it with him upon the stand.

The COURT.—Then it will be admitted as a part of your case in chief.

Mr. WHEELER.—As a part of our case in chief, yes.

Mr. THATCHER.—I would like to object on the ground it is not competent, relevant or material to any issue in this case.

The COURT.—I think it tends to show that the plaintiff was relying on this expert at the time the telegram was written, and for that purpose it is admissible as part of their case in chief.

Mr. WHEELER.—(Q.) Prior to January 16th did you make any report of any kind to Mr. Taylor?
[211—207] A. Yes, I did.

(Testimony of Howland Bancroft.)

Q. Was it in writing, or orally? A. Orally.

Q. State what the report was.

A. The conversation which I had with Mr. Taylor regarding this property would hardly be called a report, although I did discuss with him the apparent merits and demerits of the property as then understood by me, which opinion I had as a result of having spent one day upon the mine in November, and having read this report of Mr. Hyder's.

Mr. DAVIS.—Q. You mean November, 1918?

A. Yes, I should have said so.

Mr. WHEELER.—(Q.) Will you please state what the report was; give us the substance of it as closely as you can?

A. It would be very difficult for me to give you any kind of a summary of what I told Mr. Taylor early in January, other than it was a proposition which appeared to be of interest to me, and it might be of interest to him.

Q. Did you talk tonnage or values at that time to Mr. Taylor? A. I may have.

Q. Have you any recollection at all upon the subject?

A. Well, I could not tell you whether I talked tonnage or values with him; I probably said something about the possibilities of the mine.

Q. What is that you can't remember?

A. I must have, because we would not have anything to talk about otherwise.

By Mr. COOKE.—(Q.) Just a question. From the information that you had at that time, Mr.

(Testimony of Howland Bancroft.)

Bancroft, prior to January 16, 1919, are you able to state whether you discussed any certain number of tons as being in the mine, or probably being in the mine? [212—208]

A. I would probably not say anything about tonnage being developed, because I had taken no samples whatever.

Q. At that time, I mean prior to January 16, 1919, did you have any knowledge of the extent of the ore that was exposed, blocked out in the mine?

A. No definite knowledge of my own taking; I simply walked through the mine one day in November, 1918, and I would have no specific knowledge of my own.

Q. Did you have any definite knowledge at that time from your own observations or tests as to the tungstic acid or content in the ore?

A. I had made no tests; it seems to me we were informed they had shipped a certain number of tons to Mill City by wagon, or hauled them by wagon to Mill City, and shipped them to Toulon; and I believe we had the results of the mill operations on that ore.

Q. Then as I understand it, Mr. Bancroft, prior to your examination beginning January 17th, 1919, you had no specific knowledge as to the tonnage exposed in the mine, or as to the value per ton?

A. No specific knowledge.

Q. And you discussed no specific values with Mr. Taylor prior to that time?

A. Not as having been developed.

(Testimony of Howland Bancroft.)

Q. Yes. A. Exactly.

Mr. WHEELER.—(Q.) Did you make any guesses?

A. Oh, I think we scribbled a lot in the way of trying to arrive at what might be possible, but that would have absolutely no value because it was simply what we thought might be, and what some of us hoped would develop.

Q. What guesses did you make and communicate to Mr. Taylor?

A. I do not know, if any specific guesses.

Mr. WHEELER.—That is all. [213—209]

Redirect Examination.

Mr. THATCHER.—(Q.) Mr. Bancroft, counsel examined you this morning as to the words 1.40 per cent tungsten or 1.40 recoverable; is there any difference between assay values of say 1.75 per cent, and the term 1.75 per cent tungsten recovered, or tungstic acid recovered?

A. The amount of tungsten in each instance is the same; the ore in the mine averaging 1.75, you would not recover all of that by treatment.

Q. When the word recoverable is used, it means allowing for the loss in milling or concentrating; and that is covered in your report and allowances made?

A. Most decidedly, if I say recoverable it means that.

Q. And where the word recoverable is used, it means on a basis of 80 per cent recovered; is that it? A. That is what it means.

(Testimony of Howland Bancroft.)

Recross-examination.

Mr. WHEELER.—(Q.) The figures when you put them on the map indicate the return of the assayer, or amount recoverable?

A. The return from the assayer.

Q. It is a fact, is it not, Mr. Bancroft, that after you had made your examination in May, from your first returns from the assayer you estimated upwards of 21,000 tons in the mine, but later on, after you had the final returns, you reduced that to upwards of 18,000 tons; is that right?

A. Yes, sir; but I had not a sufficient amount of information to have concluded my calculations; that was a preliminary estimate.

Q. The preliminary estimate, in other words, was about 3,000 tons higher than your final estimate?

A. As I remember, it was about 21,000 tons.

Q. That accounts then for the apparent discrepancy in some of the exhibits here, between the first suggestion of 21,000 and later [214—210] suggestion of a smaller amount?

A. Yes, I should like to tell you why.

Q. It is a matter of no consequence; I simply want to clear up that matter in the record; that it was not an error in the telegram but a change on your own part.

Mr. WHEELER.—That is all.

Mr. THATCHER.—(Q.) Why was that; will you explain?

A. I was being urged continually to give some

(Testimony of Howland Bancroft.)

result, some determination of the tonnage, and the first assays which were received led me to believe that such a tonnage could be expected; when the final assays, in other words, when the list of assays of samples was complete, there was more non-commercial ore than had at that time appeared, so that the final calculations as they appear in my report are the correct calculations for that second examination.

Mr. COOKE.—(Q.) 19,800, isn't it?

A. I must say I don't remember.

Mr. WHEELER.—(Q.) At any rate, as I understand, there was an error in your calculations?

A. No error.

Q. No error, but what?

A. One was a preliminary estimate; the 2d of June report was a final report.

Mr. WHEELER.—That is all.

Mr. THATCHER.—That is all.

(By agreement of counsel Mr. Bancroft is excused from further attendance on Court.) [215—211]

Testimony of David Taylor, for Plaintiff (Cross-examination—Resumed).

Cross-examination of Mr. DAVID TAYLOR
Resumed.

Mr. WHEELER.—(Q.) Mr. Taylor, when you went to New York in 1919, after your visit to the mine, do you remember what day you started and what day you arrived in New York?

(Testimony of David Taylor.)

A. I can tell you from my diary.

Q. I wish you would.

(Witness examines diary.)

Q. Started, I mean, from Mill City or Lovelock, as I understood you testified before, that you went straight through without stopping in Denver.

A. I left Lovelock on Sunday, the 27th.

Mr. COOKE.—(Q.) That is May?

A. Sunday, April 27th; arrived in New York Thursday, May 1st.

Mr. WHEELER.—(Q.) Where on the way did you meet Mr. Thane?

A. You mean where did I first actually see him?

Q. Yes.

A. I saw him at breakfast Friday morning after leaving Lovelock.

Q. At what place?

A. At breakfast in the dining-car.

Q. And he travelled on with you to New York?

A. Yes.

Q. At that time you were expecting to interest New York capital in this transaction, were you not, or hoping to? A. We were hoping to, yes.

Q. And can you give us the date on which your hopes in that connection were abandoned, and you determined to go ahead with Mr. Thane?

A. They were never specifically abandoned.

Q. Never finally abandoned; you use the word specifically; the hope never was given up, you mean?

A. No, because there was information given us

(Testimony of David Taylor.)

by several people that they would take an interest after the transaction had been consummated.

Q. After the what?

A. After the transaction had been closed. [216—212]

Q. I call your attention to Defendants' Exhibit "A," a letter from Mr. Thane to Mr. Bayless, which you identified as being familiar with, dated May 14, 1919, and particularly to this passage therein: "In anticipation that we will succeed in raising the necessary money to close the deal with the Nevada Humboldt Tungsten Mines Company on May thirty first it is necessary that we should have certain information in such shape that there will be no question about carrying out the transaction." Now, on that date I call your attention to the fact, May 14th, you say "In anticipation that we will succeed in raising the necessary money to close the deal;" were you then still expecting or anticipating that you would raise the necessary money in New York with which to close the deal?

A. Not all of it.

Q. But you were expecting to raise a portion of it in New York?

A. Mr. Thane was expecting to raise a portion of it.

Q. What were you expecting to do in New York with the people you had dealt with, on the 14th day of May, 1919?

A. I could not tell you exactly what I was expecting on that date.

(Testimony of David Taylor.)

Q. At any rate you expected still, on May 14th, 1919, to get some New York capital in, did you not?

A. I hoped to.

Q. And you were proceeding upon that basis, is that right?

A. I was proceeding on that basis throughout.

Q. You had not on that date definitely determined that you yourself would advance any designated or named portion of the amount, had you?

A. Not any specific amount as far as I know now.

Q. I call your attention to defendants' exhibit "C," a letter from David Taylor to R. Nenzel, dated May 20, 1919, and particularly to the following passage therein: "If the auditor's report of the books; Bayless' report on the title; and Bancroft's examination checks up to what we expect Thane and I personally expect to go [217—213] through with the deal"; was it the fact that intermediate to May 14th and your writing of this letter on May 20th, you had determined to go forward with the deal, advancing your own money, whether you obtained money in New York or not?

A. I don't see the passage you read in this letter.

Q. It begins with the words "If the auditor's report of the books."

A. What was the question, please.

(The reporter reads the question.)

A. I would say from that letter it was; we had always expected that we would eventually

(Testimony of David Taylor.)

be able to place some of that stock in New York.

Q. That is, after the deal was closed?

A. Yes, Mr. Thane thought he could beforehand; I had several people who said they would probably take some later.

Q. The point I want is this, I want to get simply at the facts of the matter; when on May 14th you prepared to send Mr. Bancroft forward you then expected to raise the money, or a considerable portion of it, in New York, and you had given that up, as I understand it from your testimony, by the 20th, when you wrote the letter, Exhibit 10, and expected that Mr. Thane and yourself would go ahead with the deal, is that right?

A. Not entirely, no, sir.

Q. Not entirely but only in this sense; not entirely, that you still hoped that later on when the deal was closed some New York people would come in, is that it?

A. No, sir, we hoped right along that some New York people would come in before the deal was closed.

Q. Then will you explain to the Court what you intended by this passage in this letter of May 20th, Exhibit "C"; "If the auditor's report of the books; Bayless' report on the title; and Bancroft's examination checks up to what we expect, Thane and I personally [218—214] expect to go through with the deal."

A. It seems to me that is very clear.

(Testimony of David Taylor.)

Q. What did you mean by "personally expect to go through with the deal"?

A. That Mr. Thane and I personally expected to put up the money to go through with it.

Q. That is exactly what I am asking about. So you did expect, you and Mr. Thane personally would put up the money when you wrote this letter?

A. You mean we expected to put up the money as a definite investment of our own, or advancing it; it seems to me there is a great difference.

Q. Did you expect to advance the money yourselves? A. That is what this letter says.

Q. And the fact is at the time you wrote that letter you had given up any expectation of getting New York capital, hadn't you? A. I had not.

Q. Well, what did you mean by saying in the letter, nobody in the east wanted to tackle the proposition unless they had control, and we were unwilling to give that up, coupled with the statement, "Thane and I personally expect to go through with the deal?"

A. Possibly nobody is a strong word for that. As I testified yesterday, as I remember now, there was one particular person who would not go through without taking control; now if we were to have 62 per cent of that stock, and we had to give control with 51 per cent to somebody else, there would not be much left to us for our services in promotion.

Q. Did you or did you not mean to say in that

(Testimony of David Taylor.)

letter that nobody in the east would come into the deal unless you would give up control, and that therefore you and Thane personally had concluded to go on with the deal?

A. No, sir, I should say I did not mean that nobody in the east [219—215] would absolutely.

Q. Well, what was the fact, regardless of what you meant by your expression in your letter; was it the fact that you and Thane did expect personally to go on with the deal?

A. We expected to go on there and advance the money.

Q. Then you had concluded to advance the necessary money after failing in the east to get people to put it up, is not that so?

A. We had not failed at that time, but concluding and expecting are two different things.

Q. Up to that time you had not succeeded in getting one dollar in New York, had you?

A. No, sir.

Q. And therefore you expected to put up every dollar that might be necessary to supplement your father's promised subscription, and Mr. Brown's promised subscription, did you not?

A. Will you repeat that, please?

(The reporter reads the question.)

A. If before it was necessary to have money to put up we got no money anywhere else, we did.

Q. When did you determine that you would do that? A. I could not tell you exactly.

(Testimony of David Taylor.)

Q. That letter is dated May 20th, did you reach that conclusion intermediate to the 14th day of May and the time that you wrote the letter on the 20th? A. I could not tell you, sir.

Q. I again call your attention to the telegram to Mr. Bayless, Defendants' Exhibit "A"; "In anticipation that we will succeed in raising the necessary money to close the deal," dated the 14th day of May; were you not on the 14th day of May still expecting to raise the money in New York, and did you not reach the conclusion that you and Mr. Thane would personally advance the money after you had failed in New York, before you wrote that letter dated the 20th? [220—216]

Mr. THATCHER.—If the Court please, I want to object to the examination as not proper cross-examination, and interrogating this witness about Thane's telegram and Thane's declarations, which are not Taylor's declarations.

Mr. WHEELER.—The witness has identified the telegram.

Mr. THATCHER.—Yes, the witness has identified the telegram; Thane's expectations might have been one thing and Taylor's an entirely different thing. I think it is perfectly proper to inquire into Mr. Taylor's attitude in the matter, but not with reference to what Mr. Thane had said.

The COURT.—I will allow the question. Of course the witness understands that this is Thane's telegram. Proceed.

WITNESS.—May I have the question?

(Testimony of David Taylor.)

(The reporter reads the question.)

A. I could not tell you, sir, the exact date at which we reached any definite conclusions about it.

Mr. WHEELER.—(Q.) This at least you can tell me, can you not; that you had not arranged or prepared to advance any specific amount by the 20th day of May?

A. After the 20th day of May I was prepared to advance a considerable amount, if it was necessary.

Q. Answer my question, please. I ask that the answer go out as not responsive to the question, your Honor.

(The reporter reads the question.)

Mr. WHEELER.—If that is so, I was mistaken. The witness' answer may stand. (Q.) Had you at that time prepared even to advance a specific amount; by that I mean had the number of dollars and cents to be placed into the deal by you been arrived at? A. Not specifically, no, sir.

Q. You were still hoping, were you, up to the 20th day of May, [221—217] and after the 14th day of May, that you would succeed in getting eastern capital to contribute, not after the deal was closed, but to the deal?

A. I don't remember the exact dates that I hoped one thing or another.

Q. Can you say when you abandoned the expectation that eastern capital would come into the transaction before the deal was closed?

A. No, I cannot.

(Testimony of David Taylor.)

Q. At the time that you telegraphed to Mr. Bancroft to come on and make an examination, had you yourself agreed to or placed in this transaction any sum of money whatever?

A. Had I agreed with anybody else to subscribe any definite amount of stock, do you mean?

Q. Yes. A. Not irrevocably agreed, no, sir.

Q. What say?

A. Not irrevocably agreed, no, sir; my impression is that Mr. Thane and I said to each other, and to various people from the beginning, that we would each take twenty-five thousand, and possibly more.

Q. From the beginning, you mean from the day that you talked the matter over on the train?

A. That is my impression; that is the first time that Mr. Thane and I—

Q. (Intg.) And that was the day on which Mr. Thane said Mr. Bancroft or some one should make an examination of the property, was it?

A. I don't know whether it was the exact day or not; it was within a day or so.

Q. At any rate you did not understand that Mr. Thane at any time had agreed to advance one cent in this matter, or cause it to be advanced, unless there should be an examination made of the property?

A. I am not sure whether that subscription was made first or last. [222—218]

Q. At any rate they were almost contemporaneous, weren't they?

(Testimony of David Taylor.)

A. I should say within a few days of each other, yes; whether Mr. Thane said specifically he would not go in at that time without a report, or whether that came a day or so later, or how it was, I don't remember.

Q. You testified that that conversation did take place on the train, I believe?

A. My impression is it did.

Q. And it must have been before the first day of May, because you arrived in New York on that day, is that right?

A. If it was on the train it was, yes.

Q. Now up to the time that you had the conversation with Mr. Thane in which he spoke to you of the necessity of having an examination made, just what money had you spent in this transaction?

A. The exact amount up to that time?

Q. If you can give me the exact amount up to that time.

A. I cannot tell you exactly, because I don't remember the exact time.

Q. What say?

A. I don't remember the exact time, I therefore cannot tell you the exact amount up to such time.

Q. Do you claim as a part of the eight thousand and odd dollars mentioned here in your complaint, the expenses incurred by you in making your own trip from Denver to the mine and back to New York?

A. Yes, sir.

(Testimony of David Taylor.)

Q. Do you include therein your incidental expenses of board and lodging by way and in New York? A. Yes, sir.

Q. What other money had you expended in connection with this deal for any other purpose up to the date that you and Mr. Thane discussed this matter of sending an expert to examine the property? A. I could not tell you exactly, sir.

Q. Well, at any rate, whether your claim is correct or not, or [223—219] whether it is a proper claim or not, you do claim your railroad fare and incidental expenses going from Denver, and back past Denver, though you did not stop at Denver, on to New York?

A. That was included in that amount, yes, sir.

Q. Can you give us approximately the amount that you had expended up to the time that you and Mr. Thane had this talk on the train with regard to this matter?

A. No, sir, I could not, because my expense account of that trip involved the trip, I could not segregate just how much was spent up to each date.

Q. Do you recall what the railroad fares were?

A. No.

Q. Can you tell us whether you spent a hundred dollars, seventy-five dollars, or a hundred and fifty dollars?

A. No, I could not tell you that; I could tell you the expense of general travel involved in this.

(Testimony of David Taylor.)

Q. Give us as nearly as you can the amount of your expenses up to the time that you held this conversation.

A. I could not do it, sir.

Q. You say you have expended in this matter eight thousand dollars, does that include the money that you expended to pay the expenses of Mr. Bancroft? A. Yes.

Q. Was that an item which also included the amount with which you satisfied Mr. Bancroft's interest in the deal of March, 1920? A. No, sir.

Q. Did that include the expenses of your own counsel, and of an auditor in coming from New York? A. You mean the \$8,000?

Q. Yes.

A. Yes, sir. It included the expense, whether it included counsel fees or not, I don't know; I have the details of that in the file here.

Q. Well whatever the amount was that you expended, every cent that [224—220] you now can recall that you expended prior to the time that it was talked over between you and Mr. Thane that an independent examination should be made, was confined, so far as you now know, to your railroad transportation expenses from Denver out to the mine, whatever incidentals you met on the way, and your expenses on the train up to the moment that you and Mr. Thane talked over the transaction? A. Yes, sir.

Q. What other expenses had you incurred in the meantime? A. I do not recollect.

(Testimony of David Taylor.)

Mr. THATCHER.—Can you get the facts?

A. Yes, I can if Mr. Wheeler wants me to.

Mr. WHEELER.—(Q.) Have you the items here?

A. I have them in the file right here.

Q. I think it is an important matter, I should like to have them.

Mr. THATCHER.—I intended to examine the witness on that matter.

WITNESS.—I simply cannot give all these figures from memory.

Mr. WHEELER.—I should like to get at it, if I can get the data.

Mr. THATCHER.—I think we can get it at recess, we will have time to hunt it up then.

Mr. WHEELER.—Very well. (Q.) In your complaint in this case you say, in paragraph 6, that you “laid out and expended for traveling expenses of plaintiff to Lovelock, Nevada, to San Francisco, California, to New York City and to various other places, for assays, for maps, for surveys, for expert services, for mining examinations and for reports, legal fees and an examination of titles and for preliminary work, for the organization of corporations and for telegraph and telephone, a large amount of money, in excess of \$8,000.” Was the amount that you paid out for the organization [225—221] of a corporation, paid out before or after you sent Mr. Bancroft to examine this property; that is to say, before or after May 14th, 1919?

A. I should say part of the expenses were in-

(Testimony of David Taylor.)

volved at the same time Mr. Bayless' trip to Lovelock was, for the purpose of getting information, and he went at the same time Mr. Bancroft did.

Q. You didn't incur any expense, however, until after, or contemporaneously with the request for Mr. Bancroft to visit the property, did you, for the organization of a corporation?

A. Yes, I think I engaged Mr. Jackson to come out here before then, the exact date I don't remember exactly, some time during May.

Q. But Mr. Jackson had not come and had not done anything at that time, had he?

A. He had been engaged to come.

Q. When was he engaged to come?

A. I don't remember exactly.

Q. Will you say that he was engaged to come prior to the 12th day of May? A. No, sir.

Q. It may have been after the 12th day of May, may it not? A. It may have.

Q. With regard to legal fees and examination of titles, that was incurred after you had determined to send Mr. Bancroft out here, wasn't it. A. The actual work—

Mr. THATCHER.—Do you want to refresh your memory?

WITNESS.—Will you read the question, please. (The reporter reads the question.)

A. I don't remember the exact time.

Mr. THATCHER.—That is shown by a telegram sent to Mr. Bayless by Mr. Thane, in which he

(Testimony of David Taylor.)

directed him to do these things, and the telegram is in evidence.

Mr. WHEELER.—Then it may be understood that the expenses were incurred— [226—222]

Mr. THATCHER.—(Intg.) (Q.) Did Mr. Bayless make more than one trip?

A. Yes, I think he made two; that was the first one that Mr. Bayless made.

Mr. THATCHER.—You want the exact dates of Bayless' trip?

Mr. WHEELER.—I want the exact dates. I don't think the point is at all discussed after the witness had determined to have an independent examination made, he incurred the expenses referred to by him here, with the expenses of traveling to Lovelock and on to New York City, or a portion of the way.

Q. In paragraph 8 of your complaint you allege that " on or about, and between the 18th and 25th days of May, plaintiff informed the defendants, Nenzel, Poole, Friedman, Jones, Murrish, Hinch, Huntington, Goodin, Twigg and Lena J. Friedman, that he was ready, able and willing to perform his obligations under the terms of said contract, Exhibit C"; in what manner did you inform them, in writing or orally?

A. I don't remember exactly; I think there was several telegrams to that effect; I think I told Mr. Poole in New York that I expected to go through.

Q. Will you please give me the originals, if you

(Testimony of David Taylor.)

have them, or the copies of any telegrams or letters, **or any document in writing**, which you now say conveyed information to the said defendants that you were ready, able and willing to perform the obligations of your contract.

A. They are probably in the files.

Mr THATCHER.—Just a minute. He asked for the document. We call for the original of certain letters that naturally would be in your possession, I will make a list of those we call for.

Mr. WHEELER.—If you will give a statement of the documents you wish we will produce them, if we have them; we are not aware [227—223] that there are any such documents in any sense of the word.

Mr. THATCHER.—I suggest that we take a five or ten minute recess and let Mr. Taylor come down and help us sort out these papers.

(A short recess is taken at this time.)

(The reporter reads the last question.)

A. The letter of May 20th, which you gave me a few minutes ago goes into the various—

Mr. WHEELER.—(Q.) The letter of May 20, 1919, you say is one of the documents which you referred to when you made your allegation in your bill, which I read a moment ago, just before the recess?

Mr. DAVIS.—(Q.) What exhibit, exhibit 10?

A. Yes.

Mr. WHEELER.—(Q.) Any other letter or document?

(Testimony of David Taylor.)

A. Here is a telegram from me to C. W. Poole, Washington, about some conditions, and telling him that he should be present if the deal is to be closed, and his acknowledgment of it.

Q. You have handed me one document dated May 26th, purporting to be a telegram from David Taylor to C. W. Poole, and a second, dated May 26th, purporting to be a telegram from C. W. Poole to David Taylor; are there any more?

A. There is a telegram from C. W. Poole. (Hands to counsel.)

Q. You have handed me a telegram dated May 26th, addressed to David Taylor and signed by C. W. Poole.

A. There is a telegram to C. W. Poole from B. L. Thane. (Hands to counsel.)

Q. You have handed me a telegram addressed to C. W. Poole, signed B. L. Thane, dated May 29th. Are there any others?

Mr. THATCHER.—We would like to have a letter addressed to Mr. Poole, of date May 28, 1919; a letter on the letter-head of [228—224] the Consolidated Ores Company, addressed personally, Mr. C. W. Poole, care of Nevada Humboldt Tungsten Mines Company, Lovelock, Nevada.

Mr. WHEELER.—(Q.) Counsel has handed me what purports to be a carbon copy of a letter dated May 28th, addressed to C. W. Poole, without any signature; do you recall that is a carbon copy of a letter sent by you? A. Yes, sir.

(Testimony of David Taylor.)

Q. And the original bore your signature?

A. Yes, sir.

Mr. WHEELER.—We will have no objection to the copy being used and I will ask if the letter dated May 28, 1919, is one of the documents referred to by you as being the basis for your allegation which I read just before the recess.

Mr. THATCHER.—We call for a telegram addressed to Mr. Friedman. I cannot give you the exact date, but it is to the effect that the Bancroft report shows tonnage O. K., or something to that effect, and expected to go through with the deal.

A. Telegram from Taylor to Friedman, dated about the 25th, just after the receipt of Bancroft's first telegram as to Tonnage.

Mr. COOKE.—(Q.) Can you state where the telegram was sent, addressed to Friedman at what place?

WITNESS.—I think it was Chicago.

Mr. WHEELER.—(Q.) Have you now given me all of the documents of the character referred to in the several preceding questions?

A. No, sir, I think there are some others.

Q. Where are they and what are they?

A. General telegrams and letters, written back and forth by all the defendants and myself, by which they undoubtedly understood that we expected to go forward with the proposition.

Mr. WHEELER.—I move to strike out the answer as not responsive.

(Testimony of David Taylor.)

The COURT.—That may go out. [229—225]

Mr. THATCHER.—The question is whether there were any other letters or telegrams?

A. Yes, I think there were.

Mr. THATCHER.—I would rather not have all that answer go out; he answered yes, I think there were; then went on; the answer yes, I think there were, should stand.

The COURT.—Any objection?

Mr. WHEELER.—No objection.

Q. Do you know where they are, and what they are?

A. I know the general tenor of them.

Q. I am asking you if you know where they are?

A. No, sir.

Q. What are they, letters or telegrams?

A. I should say both.

Q. But at the present time you cannot give us the whereabouts of any of them? A. No, sir.

Q. Have you them, or copies of them, in your possession or under your control?

A. Whether I have now or not, I don't know; I had a few days ago—a copy of the telegram to Mr. Friedman.

Q. Turning to the document handed to me by you, dated May 30, 1919, addressed to Mr. R. Nenzel, Secretary Nevada Humboldt Tungsten Mines Company, what passage or passages in that letter do you say gave information that you were ready, able and willing to perform your contract?

(Testimony of David Taylor.)

A. I should say the first paragraph suggests that.

Q. The first paragraph; let us hear what you claim.

A. "Will you please take steps to have all bills assembled and on hand within the next week."

Q. What else?

A. The second paragraph: "Will you also please arrange that all the stock up in escrow is forwarded to the Wells Fargo Bank in San Francisco." The third paragraph: "Will you also please have a special meeting of the stockholders called to [230—226] authorize the transfer of all Nevada Humboldt, Tungsten Products and one-half interest in Mill City Development, to a new corporation to be called the 'Nevada Scheelite Company.'" The next paragraph: "My New York attorney is going carefully into the question of size and form of corporation, etc., advisable, and will be ready to discuss these matters with Mr. Murrish in Lovelock at the end of next week." The next paragraph: "If the auditor's report of the books; Bayless' report on the title; and Bancroft's examination checks up with what we expect, Thane and I personally expect to go through with the deal."

Q. What else?

A. The next paragraph: "If there is any possible way in which you can switch the auditors from their Rochester books on to the Nevada Humboldt books and get this out quickly, I should greatly appreciate it, as I would like very much to have the

(Testimony of David Taylor.)

transfer made and the deal closed by the first of June." It seems to me the whole letter covers the matter.

Q. So that there may be no mistake about it, this letter marked Defendants' Exhibit "C," dated May 20, 1919, addressed by you to Mr. R. Nenzel, forms in part the basis for your allegation contained in paragraph 8 of your complaint, as follows: "That plaintiff, on or about, and between the 18th and 25th days of May, informed the defendants, Nenzel, Poole, Friedman, Jones, Murrish, Hinch, Huntington, Goodin, Twigg and Lena J. Friedman, that he was ready, able and willing to perform his obligations under the terms of said contract, Exhibit 'C.' "

A. Yes, sir.

Q. I call your attention to the following paragraph in the letter: "If the auditor's report of the books; Bayless' report on the title; and Bancroft's examination checks up what we expect, Thane and I personally expect to go through with the deal." Was it or was it [231—227] not your expectation to go through with the deal personally with Mr. Thane, if Mr. Bancroft's examination checked up with what you expected?

A. Do you mean personally to put up the money, or temporarily?

Mr. THATCHER.—I object on the ground the question is uncertain as to time.

The COURT.—I think the question is permissible; it certainly refers to the language of the letter. You may answer the question.

(Testimony of David Taylor.)

A. We expected to go through with the deal, whether it was personally, altogether, or with other people's money, was not definitely decided.

Mr. WHEELER.—(Q.) But you expected, if Bancroft's report was favorable, is that it?

A. Yes.

Q. Is it not the fact, Mr. Taylor, that before you had yourself determined to put up any money in this matter for the purpose of paying the creditors of this corporation, you had already determined to have an independent examination made by Mr. Bancroft? A. No.

Q. Is it not the fact that before you put up one cent of money, or intended to put up one cent of money, you arranged to have Mr. Bancroft go to this property, in order that you might see whether or not you could safely put up that money?

A. No, sir.

Q. Are you to be understood as saying that whether Mr. Bancroft reported favorably or unfavorably upon this property, you were expecting to go ahead with it? A. No, sir.

Q. You were then not expecting to go ahead if Mr. Bancroft reported unfavorably?

A. After Mr. Bancroft had gone and was making an examination, if his report was unfavorable I should not have gone ahead with it.

Q. It is the fact then that after arranging to send Mr. Bancroft, [232—228] you for the first time determined that you would go ahead personally

(Testimony of David Taylor.)

with the transaction, and that determination was subsequent to the time that you had arranged to send Mr. Bancroft forward?

A. You will have to repeat the question.

(The reporter reads the question.)

A. No, sir.

Q. Is it not a fact that you never at any time in the course of this transaction reached a point where you had determined that you would put in your own money, until after you had arranged to send Mr. Bancroft to visit the property, and that the putting in of your own money was dependent upon what Mr. Bancroft's report should be?

A. No, sir.

Q. Is it not a fact that you were trying to get money in New York, that you were not expecting to put one cent into this property that you didn't have to put into it; that you didn't know prior to sending Mr. Bancroft out, or arranging to send him, whether or not you were going to be in any way required to put up any money, and that the transactions related by you here as to putting up money, depended upon the report of Mr. Bancroft as to whether or not you should put it up.

Mr. THATCHER.—I object to the form of the question, if the Court please, on the ground it is absolutely unintelligible; that it comprises at least a dozen questions, and that it cannot be answered in its present form; and it is uncertain unintelligible.

The COURT.—We will have the question read,

(Testimony of David Taylor.)

and if the witness understands it, and can answer it, he may do so.

(The reporter reads the question.)

The COURT.—I think that is rather a hard question to answer with a yes or no.

Mr. WHEELER.—I will revise it, your Honor.
[233—229]

Q. Did you ever at any time subsequent to the 14th day of May, have any intention of putting any money into this deal, unless Mr. Howland Bancroft's report should be favorable?

A. I should say that I would not put any money into it if it had been unfavorable.

Q. Read the question, please. See if you can answer it in the form asked.

(The reporter reads the question.)

A. Yes.

Q. When? A. I could not tell you, sir.

Q. Was it after his report came in, or before?

A. Certainly not after his report came in—I say putting any money into this deal, I will change that; putting in \$150,000 in the form of a contract.

Q. Then just what do you mean that you were prepared to put in?

A. I was prepared to put up the money that I offered to do in San Francisco.

Q. \$75,000 and \$10,000?

A. Yes, that was approximately the amount.

Q. On the terms indicated by you in San Francisco. A. Subject to discussion, yes.

Q. Let us see if we can get at an understanding

(Testimony of David Taylor.)

of this. Were you at any time subsequent to the 14th day of May prepared to pay in the amount of money called for by the contract, Exhibit "C," unless Mr. Bancroft's report should prove favorable?

Mr. THATCHER.—Do you understand the question?

WITNESS.—I would like to have it repeated.

(The reporter reads the question.)

A. I am not sure of the exact date of May 14th, when Mr. Bancroft went, I should not have been prepared to put up the full \$150,000, if his report was not favorable. [234—230]

Mr. WHEELER.—(Q.) Did you ever arrange with any person, including yourself, for the loan to the Nevada Humboldt Tungsten Mine Company, the Tungsten Products Company and the Mill City Development Company, of the sum of \$150,000, or any other sum, save upon the condition that Mr. Bancroft's examination of the property should prove favorable?

A. It was never finally arranged, no.

Q. Read the last question and answer.

(The reporter reads the last question and answer.)

WITNESS.—I wish to correct that answer, and say yes.

Q. When?

A. The money was arranged by the—was available by the middle of May.

Q. From whom?

(Testimony of David Taylor.)

A. From myself, Mr. F. M. Taylor, Mr. Brown, and Mr. Thane I considered at that time, later I arranged to take care of Mr. Thane's part.

Q. You never for one moment supposed, did you, that Mr. Thane's subscription was not conditioned upon Mr. Bancroft's report being favorable?

A. Oh, Mr. Thane wanted Mr. Bancroft to go out and examine the mine.

Q. And have you not told us here repeatedly, from the 14th day of May any subscription by you or advanced by you was intended by you to be conditioned upon Mr. Bancroft's favorable report, and that you would not have advanced it if the report was unfavorable?

A. I don't think I mentioned May 14th or any specific date; I am not sure of the dates.

Q. The date on which you telegraphed Mr. Bancroft to go out.

A. After that date I telegraphed Mr. Bancroft to go out, no, we would not have gone ahead without his report being favorable.

Q. Here is what I am getting at: Did you ever put up a dollar on this transaction, and have it arranged to be loaned to any of the corporations named for the purpose of paying their debts, unless Mr. Bancroft's report should be favorable? [235—231]

A. It was put up before it was arranged for Mr. Bancroft to go out, most of it was arranged.

The COURT.—I think counsel is entitled to a categorical answer if it can be given.

(Testimony of David Taylor.)

WITNESS.—I will have to have the question again, please.

(The reporter reads the question.)

A. Yes.

Mr. WHEELER.—(Q.) When?

A. The money was arranged, most of it, the beginning of May, or the middle of May, in New York; some of it was arranged before.

Q. There is no occasion for us to fence any further. A. I am not trying to fence, please.

Q. I want to know if you have ever advanced one dollar, one cent, or any other sum for the specific purpose of loaning it to these corporations under that contract of April the 2d, save upon the condition that Bancroft's report should be favorable? A. Yes.

Q. When? A. Some time the middle of May.

Q. To whom did you offer the money, without any report from Bancroft?

A. It was not offered to anybody; the money was available there, subject to my call and use.

Q. Unconditionally ready to be loaned and advanced, without any report from Bancroft?

A. Before Mr. Bancroft was engaged to go out there, no Mr. Thane's wasn't; my own money was available, my father's money and Mr. Brown's money was available for use according to my judgment.

Q. It is a matter of fact at that time your father had not paid in one cent; Mr. Brown had not told you whether he would pay five or ten thousand dol-

(Testimony of David Taylor.)

lars; you had not made any specific deposit at that time for that purpose, you didn't know where you were going to get the sum, and hoped to get enough in New York; are you now understood [236—232] as saying that the money was ready then unconditionally, without any examination of the property by Bancroft to be loaned to these corporations?

Mr. THATCHER.—I object on the ground the question embodies three or four or five questions, and is argumentative purely, and not cross-examination.

The COURT.—Read the question.

(The reporter reads the question.)

The COURT.—Can you answer that?

WITNESS.—I can answer this, your Honor, the money was always available for my own use any time I wanted to use it, I could supply the money myself at any time, if that is an answer. I am not trying to avoid or equivocate in my answers, I simply can't understand it.

Mr. WHEELER.—I think that I am satisfied with that answer to my question, your Honor.

Q. Did you ever inform the defendants, or any or either of them, that you were ready, able and willing, without any conditions whatsoever other than those expressed in the contract exhibit "C," to make the loans to the corporation referred to in exhibit "C."

A. I think I remember informing Mr. Poole, Mr. Murrish and Mr. Nenzel just after the contract was

(Testimony of David Taylor.)

made; as I remember—may I repeat the conversation as I remember it?

Mr. WHEELER.—I move to strike out the answer as not responsive.

Mr. THATCHER.—No objection.

Mr. WHEELER.—Now read the question, and I ask for a categorical answer.

(The reporter reads the question.)

The COURT.—You may answer that yes or no.

A. Yes.

Mr. WHEELER.—(Q.) When? [237—233]

A. I think it was in my office during the conferences in April, that after this contract was signed I told all of them, or some of them, that I was able to go through with this deal myself if it was necessary, and if I wanted to do so at the time the option expired.

Q. Is that all that you said?

A. I don't remember specifically whether I said anything more or not, that was in the course of the general conversation.

Q. Is it your best recollection that was what was said by you, and all that you said upon the subject?

A. I can't say it is my best recollection. That is all that I remember now.

Q. When you said a moment ago yes in your answer to that question you meant that you had made such an offer, and that it was the offer that you had just recited, did you?

A. It was not an offer, I didn't just say that I made an offer, I said I was able to.

(Testimony of David Taylor.)

Q. Just what did you say, repeat that again please.

A. I said substantially that I was able and could go ahead with the deal and put up the \$150,000 myself if I wanted to at the time the option expired.

Q. And so that was what you called an unconditional offer to carry out the contract, was it?

A. I don't consider that an unconditional offer, no, sir.

Q. I see, then when you said a moment ago you had made an unconditional offer and subsequently defined that as the offer, you didn't really mean that, you meant you had made some other offer, didn't you?

A. I didn't mean to say that I had made an unconditional offer?

Q. Did you ever make any unconditional offer, by that I mean an offer that does not contain other terms or conditions than those expressed in the contract Exhibit "C" to go ahead and carry out the contract [238—234] Exhibit "C."

A. To go through with it and put up the entire amount of money, you mean?

Q. I mean exactly what my question calls for; I think it is plain. Please read it.

(The reporter reads the question.)

A. No.

Q. What is the answer? A. No.

Q. You allege in paragraph 8 "that said sum was pledged by plaintiff and others associated with him in the amount aforesaid, relying upon the

(Testimony of David Taylor.)

representations of the defendant Nenzel, Poole, Friedman, Jones, Murrish, Hinch, Huntington, Goodin, Twigg, and Lena J. Friedman, and the plaintiff communicated said representations to his associates; as a matter of fact Mr. Brown had not said he would subscribe five or ten thousand dollars until you returned from New York, and after you had already arranged to send Mr. Bancroft to the properties, had he? A. No, sir.

Q. And not until after you had informed him that you had arranged to send Mr. Bancroft to the properties, did he? A. I don't remember about that.

Q. And he never did put up any money, and your father didn't put up any money until after the two knew that Bancroft was to report on the properties?

A. He didn't give me the cash no; Mr. Brown never gave me any cash; my father did not give me the actual check until Mr. Bancroft was on his way, or examining the property.

Q. And you thought in your examination that it must have been after you had received Mr. Bancroft's report?

A. I said I didn't know exactly the date I got the check.

Q. And you don't know now but that it was after you had Mr. Bancroft's [239—235] full report?

A. Yes, I knew absolutely it was before I got Mr. Bancroft's report.

Q. Before you had any report from Mr. Bancroft that your father gave you that money?

(Testimony of David Taylor.)

A. It depends on what you mean by report.

Q. Well, telegram in which he told you that he had examined the property.

A. I can tell you that exactly if you will give me the date of the telegram, I know how long it took to get a check to New York, and I know the date the check reached New York.

Q. How many days does it take to get a check to New York from Denver?

A. It takes three nights and two days.

Q. When did you communicate to your father or to Mr. Brown, if ever, the result of Mr. Bancroft's report; by that I mean information which told you that the tonnage was smaller than anticipated, only 40,000 tons?

A. The first time I saw them after I got the information.

Q. When did you see them after you got that information?

A. I could not tell you exactly, I don't remember whether Mr. Brown was out of town for a day or two; my father was there during the entire time; it may have been half an hour or it may have been three hours.

Q. Is it not the fact that you had been informed through a wire from Mr. Bancroft that the tonnage estimated by him was 40,000 before your father put up any money?

A. If you will give me the date that telegram reached Denver I can answer that.

Q. You refer to the telegram, Exhibit "I," dated

(Testimony of David Taylor.)

May 22, "required tonnage exposed on at least two sides." A. Yes, that is the telegram I mean.

Q. And that was the required tonnage as indicated in your telegram 40,000 tons your telegram to Mr. Bancroft?

A. I didn't send Mr. Bancroft any telegram about 40,000 tons that I know of. [240—236]

Q. Your telegram to Mr. Bancroft told him that 40,000 tons would be satisfactory, or words to that effect, and he answered you, "required tonnage exposed on at least two sides," and he testified this morning—perhaps you did not hear him—that he understood that that referred to the 40,000 tons when he so answered?

A. He received a letter from me, that was in reply to a letter.

Q. You understood that referred to 40,000 tons called for by you, didn't you? A. Yes, sir.

Q. Now that is dated May 22, did your father put up that money before May 22?

A. The date that my father gave me the check I can't tell; the check certainly was not sent to New York until after that; whether my father gave me a check and I kept it five or six days before mailing it, I could not tell you; I have telegraphed to get the date of that check, and I shall probably have it to-morrow.

Q. The date of the deposit you recall about May 31st.

A. It is on the New York Trust Company statement May 31st.

(Testimony of David Taylor.)

Q. And you have no recollection now that you carried your father's check with you for any length of time before sending it on to New York, have you?

A. I am very certain I didn't carry it about with me.

Q. You also are very certain that you promptly sent it to New York, aren't you?

A. I am not certain.

Q. And are you not also very certain that not until after your father had been informed that Mr. Bancroft reported the tonnage of 40,000 tons, he put up that money?

A. I am not very certain, no, sir.

Q. It is your best belief, isn't it, that your father didn't put up that money until after he had been informed by Mr. Bancroft through this wire to you that 40,000 tons were exposed.

A. I haven't any particular belief about it now, as I don't know. [241—237]

Q. What day you say you first learned from Mr. Bancroft the result of his assays, his first report on the assays?

A. In January, you mean, or this last examination?

Q. The last examination.

A. May I look at the diary?

Q. Yes.

(Witness examines diary.)

A. Tuesday, May 27.

Q. Mr. Taylor, a moment ago you said with reference to the 40,000 tons, it was not in a telegram but

(Testimony of David Taylor.)

in a letter, I am now referring to Defendant's Exhibit "G," a telegram from you to Howland Bancroft in which you say, "important get immediate opinion mine no extended examination needed but want your statement that 40,000 tons sure with one point four recoverable."

A. I didn't remember that telegram; the telegram that you read me was in reply to the letter; what is the date of that telegram?

Q. This telegram is dated May 14.

A. That would have been sent from New York in getting Mr. Bancroft to go out to examine the mine, and not have anything to do with the telegram which you read me.

Q. When Mr. Bancroft sent you the telegram in which he said required tonnage exposed two sides, what number of tons did you understand him to refer to?

A. Forty or forty-one thousand the figures that were in the letter which I wrote him, and asked him to wire me as to whether that tonnage was exposed or not; I think it was I asked him to wire me whether there was at least 40,000 tons exposed.

Q. Did you tell your father that you were asking to have a confirmation on 40,000 tons before he should put up his money?

A. I don't remember.

Q. Is it your best belief you did, or that you did not?

A. My father probably saw most of the correspondence. [242—238]

(Testimony of David Taylor.)

Q. Is it your best belief you did, or that you did not?

A. I have not any belief about it, sir; I do not know.

Q. Did you tell your father when he put up the money that its use was conditioned upon a report by Mr. Bancroft that there was at least 40,000 tons exposed? A. Did I tell him so?

Q. Yes. A. No, sir, I don't think I did.

Q. What say? A. I don't think I did.

Q. Why didn't you tell the terms under which *you then* going ahead; you had previously told him you were going ahead, you say, on a proposed tonnage of 60,000; why didn't you tell him when you were going to use his money, that now you were going to go ahead if 40,000 tons were exposed?

A. I don't know; the general matters were under discussion all the time; I don't know whether it was necessary to tell him anything specific, we were talking everything over every day constantly.

Q. Were you going to use your father's money when he had subscribed it on a representation made through you to him that there was 60,000 tons of ore exposed when you had changed your plan and were going to go ahead if there was 40,000 tons exposed?

A. Not without his permission; under changed conditions I would not use his money naturally, if I had made those representations.

Q. Did you get his permission to use his money if 40,000 tons were exposed?

(Testimony of David Taylor.)

A. My impression is I had his permission to use the money if I chose to put my own into it, if I saw fit to go ahead he would go in with twenty-five thousand; that was the final arrangement.

Q. But you had concluded to go in if only 40,000 tons were exposed, according to Mr. Bancroft's report or examination. A. Yes.

Q. So when you finally concluded that you would go in it was not on a basis necessarily of 60,000 tons, but upon a basis of 40,000 tons.

A. Forty thousand tons minimum. [243—239]
(By Mr. COOKE.)

Q. Mr. Taylor, you have stated that you have had no experience in a practical way in the business of mining and in the operation of mines, I believe; is that correct?

A. Yes, sir, with the exception of some carnotite claims.

Q. Such property which is embraced in this case here you have had no experience in the handling, operation and management of that kind of property, have you? A. No, sir.

Q. Isn't it a fact that in the proposed arrangement, the arrangement proposed by you in San Francisco in the early part of June, 1919, that you insisted upon your being named as the manager of the property if that arrangement went through?

A. It seems to me I was to be named as president and the general manager—I mean named as the business manager of the company; the superin-

(Testimony of David Taylor.)

tendency or technical management was to be under Mr. Thane's supervision.

Q. Did you not insist on being named as the managing director?

A. I think I did, yes, either that or president.

Q. Didn't you insist on being named as managing director and also president?

A. I don't remember, sir; I insisted on being the manager, the business manager or head of the combination or the concern.

Q. The document that has been called to your attention which you submitted to the defendants and which was also submitted to the creditors' meeting, that was fully discussed between yourself and Mr. Jackson before it was submitted, was it not; you were familiar with all the terms embraced in that document before it was submitted?

A. Yes, sir.

Q. Did you receive any report from Mr. Bancroft as to the amount of tungsten ore exposed in this property, and its value, prior to the time when you received this report which is dated, I think, [244—240] February 2, 1919? A. No, sir.

Mr. THATCHER.—I object on the ground it is not proper cross-examination; I did not ask this witness anything about any prior report to the report of Mr. Bancroft made in January.

Mr. COOKE.—Well, that is probably true, but I don't understand that I have simply got to repeat every question asked.

(Testimony of David Taylor.)

The COURT.—What is the purpose of going into that now; what does it show?

Mr. COOKE.—Well, I want to find out what the answer of the witness will be in reference to it, and then call his attention to some documents, that is all.

The COURT.—I don't see what particular bearing it can have on the case.

Mr. COOKE.—A question of his knowledge with regard to the property.

The COURT.—Do you want to show by it that he knew those statements that were made to him by the defendants in Colorado were true?

Mr. COOKE.—Well, I want to show it for one reason for the purpose of impeachment.

The COURT.—Well, you can't impeach him on immaterial matter.

Mr. COOKE.—Of course I don't think it is immaterial; your Honor might have a different opinion about it.

The COURT.—I don't see what his knowledge of the mine prior to January 1, has to do with the case, and I don't think he was asked as to his knowledge of the mine prior to that time.

Mr. COOKE.—I will submit it.

The COURT.—I will sustain the objection.

Mr. WHEELER.—I called for some items of account.

Mr. THATCHER.—I will have those in the morning.

(Testimony of David Taylor.)

Mr. COOKE.—(Q.) I show you a letter, a carbon copy of the letter, [245—241] dated May 28, 1919, purporting to be from yourself to Mr. Poole; I believe that has already been shown to you and you have identified it as a carbon copy of a letter sent by you to Mr. Poole? A. Yes, sir.

Mr. COOKE.—We offer the letter in evidence.

Mr. THATCHER.—No objection.

(The letter dated May 28, 1919, is marked Defendants' Exhibit "P.")

Mr. COOKE.—(Q.) In reference to this subscription, or the amount of money that your father was to put up, Mr. Taylor, you testified on yesterday, I think, that at no time was there any discussion between you and him in which any other amount than \$25,000 was mentioned, and that the twenty thousand figure mentioned in a certain telegram was a typographical error.

A. I assumed it was a typographical error; it was an error.

Q. I will ask you if the reference to F. M. Taylor, twenty thousand that he was going to raise in connection with this matter, in this letter I am just handing you, and which you have identified, is that also a typographical error?

A. It is an error; there was never any sum agreed on except twenty-five thousand.

Q. "Mr. Brown has taken 10,000; F. M. Taylor 20,000; leaving me possibly 120,000." The F. M. Taylor 20,000 is also an error there?

A. Yes, sir, it is an error.

(Testimony of David Taylor.)

Q. It should be 25,000? A. Yes, sir.

Q. I think you also stated in your testimony yesterday, Mr. Taylor, that one reason at least for your saying that was a typographical error in the telegram was that Mr. Nenzel had informed you that there was an increase in the indebtedness of \$5,000, which would make the total amount 155,000 which would be required for you to raise, and therefore the subscriptions named by you in the telegram, totaling 150,000, would show it was a typographical error; it should have been [246—242] 25,000, making the sums mentioned 155,000; have I made my question clear? A. Yes, sir.

Q. That is correct, is it?

A. I think I suggested that as a possible explanation.

Q. Do you still believe in that explanation; do you believe that explanation explains?

A. Well, you had better go over it again, I am trying to follow you.

Q. Isn't it true you didn't receive the information from Mr. Nenzel until after you had sent that telegram in which you mentioned that 20,000 subscription?

A. Can you give me the date of that telegram; I can answer it then, sir, that I received that information from Mr. Nenzel—somewhere about the 21st or 22d.

Q. Would you say that it was not after you had sent this wire, in which you mention your father's

(Testimony of David Taylor.)

subscription at 20,000, which you now say is a clerical error?

A. I don't remember the exact day I received and sent those letters.

Q. Mr. Taylor, I show you what purports to be a telegram from you to Mr. C. W. Poole, dated May 26th; state, if you can, whether you sent that?

A. Yes, sir.

Mr. COOKE.—We offer it in evidence.

Mr. THATCHER.—No objection.

(The telegram dated May 26th is marked Defendants' Exhibit "Q.")

Mr. COOKE.—(Q.) In this telegram, Exhibit "Q," you state: "Nenzel now reports indebtedness five thousand more than estimated"; that telegram being dated May 26th; do you know when you received or how you received the report from Mr. Nenzel as to that \$5,000?

A. It is probably in a telegram or letter that I have there.

Q. Can you produce that? A. Yes, sir.

Q. I wish you would do so.

(At 4:40 o'clock P. M., court adjourned until Friday, September 17th, 1920, at 10 o'clock A. M.)
[247—243]

Friday, September 17th, 1920.

Court convened. 10 o'clock A. M.

Cross-examination of Mr. DAVID TAYLOR
Resumed.

Mr. COOKE.—(Q.) Mr. Taylor, along about the middle of May, I will take it from the 15th of May

(Testimony of David Taylor.)

to the 20th of May, 1919, what was the base of indebtedness used by you, of the Nevada Humboldt Tungsten Mines Company, in making your calculations for raising the money that you undertook to raise?

A. Approximately 225,000 — 220,000, of which 70,000 was due to me personally.

Q. That would be 150,000?

A. It was about 150,000, approximately 150,000 net.

Q. Mr. Taylor, I show you what purports to be a telegram from yourself to the Nevada Humboldt Tungsten Mines Company, dated May 25, 1919, and ask you if you will look that over and state whether that is a telegram sent by you to the address named. (Hands to witness.) A. Yes, sir.

Mr. COOKE.—We offer it in evidence.

Mr. THATCHER.—No objection.

(The telegram dated May 25, 1919, is marked Defendants' Exhibit "R.")

Mr. COOKE.—(Q.) I show you a telegram dated May 24, 1919, from R. E. Nenzel, addressed to yourself, 73 Symes Building, Denver, Colorado, and ask you if you received that telegram? A. Yes, sir.

Mr. COOKE.—We offer it in evidence.

(The telegram dated May 24, 1919, is marked Defendants' Exhibit "S.")

Mr. COOKE.—I show you a telegram signed Nevada Humboldt Tungsten Mines Company, addressed to yourself, dated May 26, 1919, and ask if

(Testimony of David Taylor.)

you received that telegram on or about the date that it bears? A. Yes, sir. [248—244]

Mr. COOKE.—We offer it in evidence.

(The telegram dated May 26, 1919, is marked Defendants' Exhibit "T.")

Mr. COOKE.—I think that is all. I understand these telegrams are all deemed to have been read; that is the understanding, is it, Mr. Thatcher?

Mr. THATCHER.—Yes, we can read them all a little later.

Mr. WHEELER.—Have you an itemized account, Mr. Thatcher, prepared by Mr. Taylor?

Mr. THATCHER.—(Q.) Have you the itemized account, Mr. Taylor? A. Yes.

Mr. WHEELER.—I would like to look this over, and take it up later, if I desire to question the witness.

Redirect Examination.

Mr. THATCHER.—(Q.) Mr. Taylor, I call your attention to the telegrams just referred to by counsel for defendants, Exhibits "R" and "S" and "T," the correspondence you had with Mr. Nenzel with reference to the indebtedness; did you at that time, or on or about that time, have or receive a statement from the Nevada Humboldt Tungsten Mines Company or from Mr. Nenzel, its secretary?

A. No, not at that time.

Q. How long after that was it you received a statement?

A. I think that statement was given me in their

(Testimony of David Taylor.)

office on April 30th; that was in Lovelock, before I went East.

Q. That was before you went East? A. Yes.

Q. You knew about what it was on April 30th?

A. Knew about what it was; it was given to me by Mr. Nenzel then, stating that it was taken from their books.

Q. About that time, or about May 1st, do you know what the total debts as given to you by the company were; have you any memoranda with [249—245] which to refresh your memory, or any statement?

A. Nothing except that; I think I can tell from that.

Mr. COOKE.—What is that, Mr. Thatcher?

Mr. THATCHER.—I don't know, that is what I am trying to find out; I think it is the statement which was given to Mr. Taylor on or about May 1st.

WITNESS.—Yes, that was a memoranda made by me from such information as they gave me.

Mr. THATCHER.—(Q.) This memorandum?

A. Yes.

Q. Was that made up at the time?

A. Whether it was made up at that time or a little later, I don't know; it was made up within a few days of that time; it would have been.

Q. Calling your attention to the next page of the memoranda, where did you get that?

A. That was given me by Mr. Nenzel.

Q. Do you know whose handwriting that is in; do you know whether it is Mr. Nenzel's or not?

(Testimony of David Taylor.)

A. No, I don't absolutely.

Q. It was given you by Mr. Nenzel?

A. It was given to me by Mr. Nenzel, or somebody in their office.

Q. The typewritten pages that follow, where did you get them?

A. Those were given to me in their office; it was given to me the evening before I left Lovelock to go to New York; all of the typewritten pages were given to me at that time; and that is my own.

Q. That is your own memoranda; that is the recapitulation or summary of the other statements, made by you?

A. Yes; whether the information on that is taken only from these papers, or whether it includes some estimates of mine, I am not sure.

Mr. THATCHER.—We offer it in evidence.

Mr. COOKE.—(Q.) You stated these were delivered to you some time about May 1st?

A. Yes, sir, they were delivered to me on my visit to the Nevada Humboldt Tungsten Mine at Lovelock. [250—246]

Q. As at what date? In view of the fact there appears to be no date on the papers, I ask you this question, on what date do you understand it to be a statement of the indebtedness?

A. I understood it to be a statement up to date, at the time it was given me, whether within one or two days of then, or right up to date, I don't remember; it was supposed to be the approximate condition of the accounts at that time.

(Testimony of David Taylor.)

Q. There is one dated February 28th, in lead pencil? A. That is evidently an older one.

Q. You say that is evidently an older one?

A. Yes. I will change my answer on that; I am not absolutely sure; I think there was a statement given me some time earlier, that I made a lot of figures on; I am very sure that that statement was given me at that time, approximately at that time.

Q. Which statement do you mean was given you at that time, the one you made the figures on?

A. No, that is my own; that statement was made up from figures given me during or about the time of my visit to the mine; whether these were given me then or given me at some previous time, I could not tell; there is a date of February 28th on one of them, and there is a date—I notice here marked ledger balance 331, that ledger balance 331 could not have been given me the 1st of May without my asking for something else.

Q. Then you have no means of knowing positively, outside of those two that have dates upon them, to what dates the balances refer, have you?

A. No, sir, not absolutely.

Mr. COOKE.—We object to the offer on the ground it is not sufficiently authenticated with respect to the time, and for the further reason it includes as a part of the offer the recapitulation or summary by the witness, which he says is made or based in part upon the documents to which it is attached, and in part upon other documents, which are not made a part of the offer. [251—247]

(Testimony of David Taylor.)

Mr. THATCHER.—I withdraw the exhibit.

Mr. THATCHER.—(Q.) Mr. Taylor, under the terms of the contract Exhibit “C” attached to the complaint, the debts of the company are estimated to be \$220,000? A. Yes.

Q. Your testimony here has been directed toward the sum of \$150,000 or the raising of that amount will you state to the Court why that is, and account for the difference?

A. The two hundred and twenty or twenty-five thousand, or whatever it was at April 2d, included under the Nevada Humboldt Mine’s debts an item of about seventy-five or seventy-eight thousand dollars that was due me that I had already advanced them on tungsten concentrates that were in transit, and had not been sold or had not been collected upon at that time; that being taken off of the 223,000 left 145,000 or 150,000 approximately. The other debt was secured by concentrates which were under the ore contract shipped for sale.

The COURT.—(Q.) What other debts do you refer to?

A. The seventy-five or seventy-eight thousand. I had made an ore contract by which I was obligated to advance them a hundred thousand dollars on concentrates as shipped; that contract had nothing to do with the option contract.

Mr. THATCHER.—I move to strike the last answer out as a conclusion of the witness.

Mr. WHEELER.—That was Exhibit “A” annexed to the complaint.

(Testimony of David Taylor.)

The COURT.—That may go out.

Mr. WHEELER.—Let it be understood that your contract was Exhibit “A.”

Mr. THATCHER.—Exhibit “A.” (Q.) An advance of \$75,000 had been made by you under Exhibit “A,” the ore-buying contract? A. Yes.

Q. Can you give me the dates on and after April the 2d of any money advanced on the ore-buying contract, or had it all been advanced prior to that date? [252—248]

A. I think there was more advanced later.

Q. Can you find out?

A. There was a total of \$78,000 advanced altogether.

Q. Can you find out for me how much money was advanced after the 2d day of April on the ore-buying contract?

A. I think there is a statement in the files there.

Mr. WHEELER.—Can you not reach a conclusion and agree with regard to that item? As I understand it, there was a sum of money which the witness later identified, advanced on this purchasing contract, as against concentrates, as provided for in Exhibit “A”; that subsequently, upon selling out and disposing of the concentrates, it was claimed by Mr. Taylor that he did not receive the full amount that he had advanced; accordingly he brought a suit, which we will identify here, against the corporation, a suit which was subsequently settled, and he received from the corporation the bal-

(Testimony of David Taylor.)

ance agreed upon in the settlement as due to him.

Mr. THATCHER.—That is correct.

Mr. WHEELER.—So that under Exhibit “A,” every advance that the witness made has been repaid, and no claim is made that he has not received back everything that he advanced pursuant to that contract.

Mr. THATCHER.—That is true. I want to show how much money was advanced under that ore-buying contract, on and after the second day of April.

Q. I will call your attention to a memoranda, and ask you if you can refresh your memory from that memoranda, as to whether any payments were made, or loans or advances made, after April 2d on the ore-buying contract?

A. Yes, there were two advances.

Mr. THATCHER.—Just a moment. Do you want to strike that out?

Mr. COOKE.—No, I just want to know when this memoranda was made.

WITNESS.—I could not tell you, it was made from my books. [253—249]

Q. Was it made recently, or on or about that time? A. It has been made recently.

Q. Do you know who made it?

A. That is my handwriting; that is all my handwriting.

Q. That is, it was made up some considerable time ago, and made from your books, is that correct?

A. I don't remember just when it was made, I

(Testimony of David Taylor.)

think it was, yes; it must have been made from my books or the records in Denver, Consolidated Ores Company records.

Mr. THATCHER.—I don't think there should be any dispute about it, Mr. Cooke; your books should show whether it is true or not.

Q. Will you tell me when the amounts of the advances and the dates after April 2d, on the ore-buying contract, Exhibit "A."

A. Two advances made here, \$10,000, April 17th, and \$18,000, May 10.

Mr. WHEELER.—(Q.) To be clear about that, those advances were made against concentrates, were they, under contract Exhibit "A"?

A. They were made against concentrates under certain modifications.

Q. Under the concentrate contract, Exhibit "A"?

A. With certain modifications, they were made against concentrates.

Mr. THATCHER.—(Q.) The question is, were they made under Exhibit "A," the ore-buying contract? A. Yes.

Mr. WHEELER.—(Q.) And they were repaid subsequently? A. Yes.

Mr. COOKE.—(Q.) And those modifications you refer to are modifications provided for in Exhibit "A," are they not, as a part of the contract?

A. No, sir.

Q. Well, they have nothing to do with Exhibit "C," the contract in this case, the modifications?

A. No.

(Testimony of David Taylor.)

Mr. THATCHER.—(Q.) What you mean by that, Mr. Taylor, then is this: That pursuant to some telegraphic request you advanced the money before the concentrates were delivered or shipped, is that the idea? A. Yes. [254—250]

Q. You agreed to that? A. Yes.

Q. But it was delivered under the provisions of the ore-buying contract, Exhibit "A" attached to your complaint? A. Yes.

Mr. WHEELER.—Perhaps it might be well to know that was a contract, Exhibit "A," that was to continue in existence notwithstanding the failure to comply with the contract Exhibit "B" or Exhibit "C"; it would not expire by limitation on June 16th; it continued.

Mr. THATCHER.—(Q.) Counsel yesterday asked for a number of telegrams and correspondence which took place between yourself and Mr. Thane; I call your attention to a Western Union Telegram, dated May 27th, did you receive that from Mr. Thane? A. Yes, sir.

Mr. THATCHER.—We offer it in evidence, if the Court please.

Mr. WHEELER.—Objected to as immaterial, incompetent and irrelevant, hearsay, *res alias actae*, purporting to be a telegram to Mr. Taylor from Mr. Thane.

Mr. THATCHER.—It is a part of the correspondence which was yesterday introduced in evidence by the defendants upon cross-examination, and clears up the statements made, and is in an-

(Testimony of David Taylor.)

swer to one of the preceding telegrams which were offered in evidence.

Mr. WHEELER.—I do not understand if Mr. Taylor makes a declaration against interest in a telegram, and sends it forward, that the reply of the individual who receives it becomes evidence.

The COURT.—Let me see the reply. (Examines telegram.) It seems to me that objection is good, Mr. Thatcher.

Mr. THATCHER.—Very, well, your Honor; I will check it up a little closer, and call your Honor's attention to it later.

Q. Mr. Taylor, I call your attention to a telegram signed by David Taylor, addressed to B. L. Thane, dated May 22d, and ask you if you sent that telegram? A. Yes.

Q. On cross-examination by counsel you testified with reference to certain Thane correspondence and statements, or those with reference [255—251] to Thane's subscription, is that the telegram with reference to that matter, sent to you by Mr. Thane? (Hands to witness.)

A. This was one sent to Mr. Thane by me with reference to that.

Mr. THATCHER.—We offer this in evidence.

Mr. WHEELER.—While no doubt it is objectionable for the purpose of clearing up a date, and we don't object if it goes in for all purposes.

Mr. THATCHER.—It may go in for all purposes.

The COURT.—Then that will be admitted.

(Telegram from B. L. Thane to David Taylor,

(Testimony of David Taylor.)

dated May 22d, is marked Plaintiff's Exhibit No. 21.)

Mr. THATCHER.—(Q.) Did you receive a reply to that telegram?

A. I think I probably did, yes.

Q. I call your attention to what purports to be a copy of a telegram addressed to David Taylor, Symes Building, and ask you if that is the reply to yours of the 22d, Plaintiff's Exhibit No. 21, sent to Mr. Thane?

A. I should say that probably was.

Q. Do you know whether you received that or not?

A. I received the telegram, yes, whether that is in reply to that particular message or to others.

Mr. THATCHER.—We offer this in evidence, if the Court please.

Mr. WHEELER.—No objection.

(Telegram from B. L. Thane to David Taylor, dated May 23d, 1919, is marked Plaintiff's Exhibit No. 22.)

Mr. WHEELER.—It is the question of interpretation put on this; they claim they show readiness, willingness and ability, we claim they show the direct opposite, unreadiness, unwillingness and inability.

Mr. THATCHER.—(Q.) I call your attention to a telegram sent to the Nevada Humboldt Tungsten Mines Company, dated May 23d, and ask you if you sent that telegram? A. Yes.

Mr. THATCHER.—I offer it in evidence. [256—252]

(Testimony of David Taylor.)

Mr. WHEELER.—No objection.

(Telegram from David Taylor to Nevada Humboldt Tungsten Mines Co., dated May 23d, is marked Plaintiff's Exhibit No. 23.)

Mr. THATCHER.—I call your attention to a telegram sent by you to Mr. Friedman and ask you if you sent that telegram to Mr. Friedman on or about the date therein stated?

Mr. WHEELER.—Any telegram you now present in this series, I think we can admit was sent by the person it purports to be signed by, and was received by the person to whom it was addressed. That will help us along a little bit. No objection to this.

Mr. THATCHER.—This telegram addressed to L. A. Friedman of date of May 7th: (Reads:) "Think money assured. Hope have funds San Francisco ten days to complete deal."

(Telegram from David Taylor to L. A. Friedman, dated May 7th, is marked Plaintiff's Exhibit No. 24.)

The COURT.—Why not hand them to counsel as long as they admit they were sent and received. (Telegrams are handed to counsel for defendants.)

Mr. WHEELER.—Telegram dated May 29th, addressed to C. W. Poole, signed by B. L. Thane, whatever may be the legal objections to it, the objections are waived.

Mr. THATCHER.—We offer this in evidence, if the Court please, a telegram addressed to Mr. Poole, signed by Mr. Thane, dated May 29th. (Tele-

(Testimony of David Taylor.)

gram from B. L. Thane to C. W. Poole, dated May 29, 1919, is marked Plaintiff's Exhibit No. 25.)

Mr. COOKE.—This telegram of May 26th, 1919, I don't know what number that will be, but we have no objection to that if it is limited to Mr. Poole, the defendant whose name appears upon it.

Mr. THATCHER.—(Q.) Mr. Taylor, I will ask you a question: When the contract of April the 2d was made, there was attached to it and [257—253] delivered to you as part of the original, powers of attorney, was there not? A. Yes, sir.

Q. And did those powers of attorney remain in your possession all of the time? A. Yes.

Q. Were those powers of attorney ever revoked to your knowledge? A. They were not.

Q. Were you ever notified of any revocation of the powers of attorney which were attached to the contract of April the 2d? A. No, sir.

Mr. THATCHER.—We offer it in evidence for all purposes, if the Court please.

Mr. WHEELER.—There was no power of attorney by all of these defendants to Mr. Poole; at least the power of attorney of Mr. Poole would not be broad enough to cover the telegram here in question, and in any aspect the matter could not reach further than Mr. Poole, and those whom he represented under sufficiently broad powers of attorney; so it should be confined to him.

Mr. THATCHER.—I take the position that the powers of attorney are sufficiently broad; that the powers of attorney authorized them—

(Testimony of David Taylor.)

Mr. WHEELER.—They are not powers of attorney to all three parties; they are three several sets of powers of attorney.

Mr. THATCHER.—That is true, and I only ask that be admitted as against Mr. Poole and those whom he represented as powers of attorney.

Mr. WHEELER.—I ask that it be admitted as against Mr. Poole and against those whom he represented by powers of attorney, if upon inspection those powers appear to be sufficiently broad, leaving that matter for argument.

Mr. THATCHER.—That is satisfactory to me.

The COURT.—It is so ordered.

(Telegram from C. W. Poole to David Taylor, dated May 26, 1919, is marked Plaintiff's Exhibit No. 26.) [258—254]

Mr. THATCHER.—(Q.) Mr. Taylor, I call your attention to a memoranda, and ask you if that was prepared by you? A. Yes, sir.

Q. And what is that memoranda, what does it purport to show?

A. It is a memoranda that shows the expenses at which I was specifically put between the dates of April 2d and the middle of June, the date I returned to San Francisco from Denver.

Q. Using that memoranda for the purpose of refreshing your memory, will you state the date, the amount, the character and nature of the expenditures made by you during that time?

Mr. WHEELER.—(Q.) When was the memoranda prepared? A. Prepared this morning.

(Testimony of David Taylor.)

Q. What was it prepared from?

A. Prepared from a detailed statement of expenses, of all expenses involved in this suit, which was prepared some time ago.

Q. Where did you get the detailed statement?

A. From my records and accounts.

Q. Sent on to you, copied by some person?

A. No, the typewritten statement was sent by me to Mr. Thatcher some six or eight months, may be a year ago, I don't remember exactly.

Q. So you made this up from a typewritten statement sent to Mr. Thatcher?

A. Sent to Mr. Thatcher; and made also from memoranda of my own taken from my books just before I left Denver ten days ago.

Q. The essential thing we are after, regardless of any technicality is that a memoranda of expenses you claim to have incurred, and which make up the \$8,000 and upwards, referred to in paragraph six, I think it is, of your complaint.

A. There are some items in that \$8,000, the original paragraph, that were not included in this; what the totals are I don't know.

Mr. THATCHER.—(Q.) Not claimed in your complaint? A. Yes.

Mr. WHEELER.—(Q.) This is the amount which you claim in your [259—255] complaint, is it?

A. Yes.

Q. Regardless of what the footing may be in the complaint, this is the amount which you claim

(Testimony of David Taylor.)

to have been expended after having been induced to enter into this contract? A. Yes, sir.

Mr. WHEELER.—If I am permitted to cross-examine on the items after they go in, we probably will save time to have it go this way. No technical objection is made.

Mr. COOKE.—I would like to inquire if we may not see the statement which you say is in your possession?

Mr. THATCHER.—We didn't have the right to collect some of these items of statement he sent me, and they were stricken out for that reason.

Mr. COOKE.—Is not that statement more complete, giving the dates, etc., than this paper here?

Mr. THATCHER.—I think not.

Mr. WHEELER.—Why not offer your paper in evidence?

Mr. THATCHER.—He has it made up in such a way, he has initials and everything else on it.

Mr. WHEELER.—I am going to thoroughly examine him on each item.

Mr. THATCHER.—I don't doubt it at all. I offer it in evidence, if the Court please.

The COURT.—If there is no objection, it will be admitted.

(The account is marked Plaintiff's Exhibit No. 27)

Mr. THATCHER.—Cross-examine.

(A short recess is taken at this time.)

Cross-examination.

Mr. WHEELER.—(Q.) Referring to Exhibit

(Testimony of David Taylor.)

27, memorandum just offered in evidence, the dates do not appear to be in order; first comes May, then June, then April, then 5/30, 6/30; I suppose that 5/30 is intended to mean the fifth month and the 30th day? A. Yes.

Q. And the 6/10 the sixth month and tenth day?

A. Yes, sir. [260—256]

Q. And that is intended to mean between those dates, the fifth month, thirtieth day and sixth month and tenth day, the items there appearing were expended? A. Yes, sir.

Q. Now is there any item on that account that represents any expenditure made by you prior to your meeting Mr. Thane upon the train on your way to New York in the latter part of April 1919?

A. Yes.

Q. That, I take it, is the item April 25th, followed by 5/23; is that right? A. Yes, part of that item.

Q. I will read the entire item: 5—there is an up and down line—30 and another line, then 6 and a vertical line, 10; that means the fifth month, the thirtieth day; the sixth month, the tenth day. Is that right?

A. Yes, it means between those dates.

Q. Then Dr to S. F. D., 541.82. The meaning of that, I take it, is David Taylor to Lovelock and San Francisco and Denver?

A. It should have been New York.

Q. It should have been NY instead of SF?

A. No, that is the wrong date. That is the expense of 5/30, Lovelock to San Francisco.

(Testimony of David Taylor.)

Mr. WHEELER.—Then I ask that the whole question be withdrawn and stricken from the record.

Q. April 25/5/23; that means between April 25th and May 23d, does it not? A. Yes.

Q. DT Trav EX D-L-NY 653 14. That is the item referred to a moment ago as containing expenses incurred by you representing money paid out by you intermediate the 2d day of April and the time that you met Mr. Thane upon the train; is that right? A. No.

Q. It is right to some extent, is it not?

A. To some extent, yes.

Q. But it also includes additional expenses met by you in New York up to the 23d day of May, does it? A. Yes.

Q. The meaning of that item is David Taylor, traveling expenses, [261—257] Denver and Lovelock and New York, 653.14, is it not? A. Yes, sir.

Q. Is that the only item upon this account which represents expenses as incurred by you prior to meeting Mr. Thane upon the train on the trip to New York in the latter part of April, 1919?

A. Yes, sir.

Q. Now will you be good enough to divide this item of 653.14, giving as nearly as you can the portion of it that you had incurred prior to your talk with Mr. Thane on the train, about sending Mr. Bancroft to the property, and the 2d day of April segregating that from expenses incurred thereafter? A. I could not possibly do that.

(Testimony of David Taylor.)

Q. Can you not give an approximation?

A. I could not even give an approximation; I don't remember now what sort of a ticket I bought even.

Q. No items on your account?

A. My items were all taken care of in my original expenses account; that is my expense account, my detailed expense account I keep on all my business trips.

Q. What has become of the detailed expense account, would not that show you what you incurred before you and Mr. Thane talked about sending Mr. Bancroft to the property?

A. It would show in a general way, the date of the conversation with Mr. Thane; it would not be an expense account.

Q. However, it would give us the approximate date, along about the 29th or 30th of April?

A. About that.

Q. This item includes your expenses while in New York for a period of twenty-three days after you met Mr. Thane on the train, does it not?

A. Yes.

Q. Do you remember what your average expenses were in New York per day? A. No, sir.

Q. Do you remember approximately what they were, ten or fifteen or twenty dollars a day?

A. No, I haven't any idea; I could tell [262—258] approximately what the hotel expenses would be; there was some entertainment, what that amounted to, the details, I could not give you.

(Testimony of David Taylor.)

Q. Can you give us no approximation of what your New York expenses were. What I am trying to find out, for the sake of the record, is just how much money you spent after you talked to Mr. Thane about sending Mr. Bancroft to visit the property?

A. I could not give you anything but a guess at it, I am sorry.

Q. Well, I would like your best guess on that.

A. Well, you fix a date at which you want the expenses divided, and I will try and divide them, I cannot do anything else.

Q. You have here a total amount, including your railroad fares, your living expenses beginning from the time that you left Denver to go to Lovelock, and back to New York, and in New York twenty-three days, 653.14; how much of that was expended in New York, where you testify you arrived on May 1st?

A. Why I should arbitrarily say that probably 200 to 250 would represent travelling expenses while on the train.

Q. And the balance of it would be the amount expended in New York, and a portion represented as travelling expenses on the train would include your living expenses on the train and incidentals after you talked with Mr. Thane about sending Mr. Bancroft to the property?

A. After I talked with Mr. Thane on the train; I don't remember the exact date of the conversation.

(Testimony of David Taylor.)

Q. So \$250 is your best estimate of what it had cost you up to the time you reached New York?

A. I don't say that, you asked me \$250 traveling expenses on that train; I think I estimated two hundred to two hundred and fifty would be about the cost of transportation and expenses while on the train from Denver to Lovelock to New York, and from New York to Denver.

Q. That is exactly what I intended, but traveling expenses on the [263—259] train includes your eating, I suppose?

A. All expenses on the train, that includes expenses for the entire round trip, that \$250 as estimated.

Q. And that is expressed in the item here?

A. Yes.

Q. So that the \$250 which is estimated, includes a portion, a small portion at least, of the amount expended by you after you had talked with Mr. Thane about sending Mr. Bancroft to the property? A. Yes.

Q. So there may be no mistake on your part, as I want you to understand it clearly, up to the time that you talked with Mr. Thane on the train the only expenses which you sue for here embrace something less than \$250, is that right?

A. Yes, sir.

Q. With reference to the rest of these items, taking the first: T J & B Legal, I suppose that means Mr. Jackson's firm, does it not? A. Yes.

(Testimony of David Taylor.)

Q. That was \$1,000 paid by you in cash on May 16th, I take it? A. Approximately May 16th.

Q. Might it not have been later it was paid?

A. It might have been May 15th, and it might have been May 17th.

Q. It was approximately that date?

A. Yes, before I left New York.

Q. "June 6, Wm. Bayless 400.00." That was Mr. Bayless, the attorney who testified here yesterday, who went to examine the property at Lovelock, and that represents his expenses—or rather went to Lovelock?

A. That represents part of his fee. There is an additional amount payable to Mr. Bayless.

Q. That has not yet been paid? A. No.

The COURT.—Did he fix the date when the Jackson fee was paid?

Mr. WHEELER.—The date here is the 16th day of May; the witness says it was approximately about the date; it may have been the 15th or 17th, but it was paid approximately at that date. The telegram to Bancroft, your Honor, asking him to go to the property was dated May 14th. [264—260]

Q. This item represents an "Additional 600.00 & expenses Service at Mine & S F.," which you say has not been paid?

A. Yes, that item was merely put on account.

Q. And that included expense money which was paid pursuant to the telegram of Mr. Thane, offered in evidence yesterday.

(Testimony of David Taylor.)

A. No, sir, it was paid on account of the general bill; I have not got a detailed bill of general expense account, of what would be fees and what would be expense account.

Q. Then the item "5/30/6/10 DT to L & S F & D 541 82," represents I take it the expenses of yourself and outlays between May 30th and June 10th, 1919, to Lovelock and San Francisco, and back to Denver, is that right?

A. I should say that May 30th date was wrong, because I left Denver, I think I left Denver the 28th or 29th; it represents expenses on that trip.

Q. So instead of reading the fifth month, thirtieth day, it should read the 29th day?

A. It should read to detailed expenses on that trip.

Q. At any rate the expenses in this item were all incurred after you had telegraphed to Mr. Bancroft to visit the property, were they not?

A. Yes.

Q. I take it the item "July 3 T J B & M," on that account is Mr. Jackson's law firm? A. Yes.

Q. Was that amount paid at that time, July 3d?

A. It was.

Q. All for services rendered subsequent to the 14th day of May, on which date you telegraphed to Mr. Bancroft to visit the property, is that right?

A. No, sir.

Q. When were those services rendered?

A. I consulted Mr. Jackson a good deal in my trip to New York, on a great many things; the

(Testimony of David Taylor.)

thousand dollars there and the fifteen hundred there, were payments on account.

Q. You consulted him with regard to your contracts "A" and "B" as well as contract "C"? [265—261]

A. I think I went over all things with him very specifically.

Q. And these items were paid not specifically on exhibit "C," but on account of all three contracts, were they not? A. I could not tell you sir.

Q. At any rate, no payment was made until the date indicated by this item of \$1500; no payment of that item was made earlier than July 3d?

A. No payment of the \$1500 was made; no; if that is what you mean by that item.

Q. That \$1500 item. On "June 19 H.—2d exam expense 297 06," that means, I suppose, Howland Bancroft, second examination, for expenses 297.06, is that right? A. Yes.

Q. That amount you paid to Mr. Bancroft on June 19th, did you, 1919?

A. I probably paid him at that time, yes.

Q. I see "Fee approx 1000.00" and in parenthesis below it, all under this date July 19th, "Total 2350.00 division later"; what is meant by that item?

A. It meant the item for fee paid Mr. Bancroft for both examinations, \$2350; I tried to get the necessary details last night, in fact, to see which amount to charge to the first examination and

(Testimony of David Taylor.)

which to the second; Mr. Bancroft will telegraph me that.

Q. I understood Mr. Bancroft to testify he was interested with you up to March of the present year; at that time he made a settlement with you, and gave up all possible interest in the contracts "A," "B" and "C," and you paid him, or agreed to pay him, a definite amount, is that right?

A. That is right, yes.

Q. So that this does not refer to item paid out by you on June 19, 1919, but represents to the extent of at least \$1,000, an item that has been paid out by you in the present year, March?

A. The date is not detailed; it don't state what date it was paid out, and that payment is an adjustment as of that examination.

Q. The fact of the matter is, you claim Mr. Bancroft was obligated to make the examination without cost, do you not? A. No, sir. [266—262]

Q. You claimed that he was entitled to charge his expenses, but that it was his duty to make a second examination because of his participation under the contract here offered in evidence, did you not?

A. No, sir; the matter was not definitely arranged until March 15th of this year.

Q. You understood, did you, that Mr. Bancroft was interested in the matter up to that time?

A. He was interested.

Q. And when you asked him to come up there

(Testimony of David Taylor.)

you assumed it was pursuant to an obligation to go there and make an examination without a fee, did you? A. No.

Q. There was no such contention made to you?

A. There may have been such contentions made, but not an understanding on my part.

Q. In other words, though you didn't have such an understanding, you tried to get Mr. Bancroft to go out there for nothing? A. No.

Q. What you were trying to do was to get him to go as cheaply as possible?

A. Naturally I was trying to get him to go out there as cheaply as I could.

Q. So you got him to give up his interest in the contract, and go for a thousand dollars?

A. Arranged for his fees as engineer.

Q. \$2300 was approved, that was to be divided between the two trips? A. Yes.

Q. When did you pay him for the first trip?

A. Expenses or fee?

Q. Fee?

A. That was paid about the same time.

Q. March of the present year? A. Yes.

Q. You paid \$2350 March of the present year?

A. Yes.

Q. But there has as yet been no assignment of that item as between professional services rendered in January and February of 1919, and in the month of May of the same year; is that right? A. Yes.

Q. So how much of this is available to matters

(Testimony of David Taylor.)

that occurred long [267—263] prior to April 2d, and how much is available to matters that occurred thereafter, you are not now prepared to say, are you?

A. I can say approximately, because Mr. Bancroft stated yesterday that one trip took about ten days, and the other seven, I just arbitrarily divided it that way on the statement, approximately.

Q. The next item: "July 11 Watts assays 2d ex 206.00"; that, I take it is the item of expense for the assays made pursuant to Mr. Bancroft's report in July, 1911; is that right; or pursuant to Mr. Bancroft's direction?

A. In June, his last examination.

Q. In May and June? A. Yes.

Q. And was paid by you on July 11th?

A. Paid by me approximately that date.

Q. That referred to no expenditures at any time prior to the time that you sent Mr. Bancroft to the property? A. No.

Q. I see an item here "Jackson x," I suppose that was your counsel's expenses, \$500? A. Yes.

Q. What does that represent?

A. Mr. Jackson's expenses, New York to San Francisco and return.

Q. In what month?

A. May and June, 1919.

Q. That was the trip that brought him to San Francisco, on which the interview with the creditors took place? A. Yes.

(Testimony of David Taylor.)

Mr. WHEELER.—I think that covers all of the items. That is all.

Redirect Examination.

Mr. THATCHER.—(Q.) Did you have an agreement with Mr. Jackson at the outset as to his fee?

A. Yes.

Q. What was the amount that you were to pay Mr. Jackson? A. \$5,000.

Q. Was that afterward changed?

A. It was left in abeyance.

Q. And the amount which you have paid is—

A. (Intg.) \$2500.

Q. At the time that was arranged for was there any contemplation [268—264] of the meeting of creditors, and other situations which developed in San Francisco on or about June 2d? A. No.

Q. What did it contemplate, if you know?

A. It contemplated Mr. Jackson going out about the end of May, when I sent for him, going into the title, and looking up the general title, giving advice, and attending to the reorganization of the old companies or the formation of a new one, transferring the assets, and general advice and legal advice in the entire transaction.

Q. I call your attention to the item “Wm. Bayless 400.00”; and “additional 600.00 expenses”; You have never adjusted that matter with Mr. Bayless, have you? A. No, sir.

Q. As a matter of fact, some of those services were rendered at the meeting at San Francisco?

(Testimony of David Taylor.)

A. Yes.

Q. And are included in this? A. Yes.

Q. The \$400 was the only amount you paid Mr. Bayless prior to the meeting of the defendants in San Francisco?

A. That is the only amount I paid; I think that was paid just before I left San Francisco to return to Denver, after the meeting of the creditors and everything else; I am not sure of the exact date, I think it was.

Q. Do you know Mr. W. J. Loring?

A. Yes, sir.

Q. Did you ever discuss your contracts in relation to the defendants at any time with Mr. Loring? A. Yes, sir.

Q. Where?

A. At breakfast in the Belmont Hotel in New York.

United States
7
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.
(IN FOUR VOLUMES.)

DAVID TAYLOR,

Appellant,

vs.

NEVADA HUMBOLDT TUNGSTEN MINES COMPANY,
a Corporation, TUNGSTEN PRODUCTS COMPANY,
a Corporation, MILL CITY DEVELOPMENT COM-
PANY, a Corporation, W. J. LORING, C. W POOLE,
R. NENZEL, H. J. MURRISH, L. A. FRIEDMAN,
C. H. JONES, G. K. HINCH, J. T. GOODIN, V. A.
TWIGG, J. C. HUNTINGTON and LENA J. FRIED-
MAN, Individually,

Appellees.

VOLUME II.
(Pages 353 to 768, Inclusive.)

Upon Appeal from the United States District Court for the
District of Nevada.

FILED

SEP 7 - 1922

F. D. MONCKTON,
CLERK

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District of Nevada.

(Testimony of David Taylor.)

Q. State what took place at that time, Mr. Taylor?

A. I telegraphed Mr. Loring, asking to meet him for general discussion of the tungsten situation, and with the understanding that there was a combination of all the tungsten producers in this country whom he represented, and I wanted to secure the sales agency of that product; I understood that Mr. Loring was the man to talk to; [269—265] I telegraphed him, and made an engagement to meet him in New York, took breakfast with him, and discussed various matters; I told him that we had not made an agreement with these people; I think I went into the matter in detail, I am not sure as to just what detail; I told him that we had a claim against these people, and unless we—

Mr. COOKE.—(Intg.) As to any conversation between this witness and Mr. Loring, we object to it on the part of the defendants other than Mr. Loring, on the ground it is hearsay, incompetent, irrelevant and immaterial what discussion they may have had, and not binding upon us.

Mr. THATCHER.—Not binding on anybody but Mr. Loring; we don't contend it is binding on anybody but Mr. Loring.

Mr. WHEELER.—I suppose it is addressed to the question of notice to Mr. Loring?

Mr. THATCHER.—The question of notice, yes.

Q. Did you finish the conversation?

A. No. I told Mr. Loring at that time—just

(Testimony of David Taylor.)

into how much detail I went I don't know—I gave him the general substance of our negotiations and interviews in San Francisco; told him the matter was not settled, that we had hoped to get it settled, that we still had hopes; that Mr. Thane was negotiating at that time, or Mr. Bayless was, and asked him if he had any interest in the matter then; he said he did not at that time; I told him that the probabilities were, if we didn't make a settlement with them, that we would file some sort of a suit, just what I didn't know.

Q. Was that all the conversation?

A. That was in substance all.

Q. That is the substance of the conversation, not the exact words? A. Yes.

Q. Did you ever send Mr. Loring a telegram?

A. I did.

Q. Some time in August, 1919?

A. I think it was, yes. [270—266]

Q. Will you produce that telegram, Mr. Davis, please?

(The telegram is handed to counsel for plaintiff.)

Mr. THATCHER.—We offer this in evidence.

Mr. WHEELER.—No objection.

Mr. THATCHER.—(Q.) This is the telegram you sent, is it? A. Yes.

(The telegram from David Taylor to W. J. Loring, dated Aug. 10, 1919, is admitted in evidence, and marked Plaintiff's Exhibit No. 28.)

Q. You received an answer to that telegram, from Mr. Loring? A. Yes.

(Testimony of David Taylor.)

Mr. THATCHER.—We offer this in evidence.

Mr. WHEELER.—No objection.

(Telegram from W. J. Loring to David Taylor, is admitted in evidence, and marked Plaintiff's Exhibit No. 29.)

Mr. THATCHER.—(Q.) Mr. Taylor, has Mr. Thane any interest in this controversy at the present time? A. He has not.

Q. Or in the property? A. He had not.

Q. Has he released his interest? A. He has.

Q. I call your attention to this statement, do you know Mr. Thane's signature? A. Yes.

Q. Is that his signature signed there to the release? A. It is.

Q. What is the date of that?

A. September 11, 1920.

Q. Had you had any word or letter from Mr. Thane previous to that time, stating that he was out?

A. I had a letter from Mr. Bayless, written on behalf of Mr. Thane.

Q. Didn't you have any letter from Mr. Thane?

A. No, no direct letter from Mr. Thane.

Mr. THATCHER.—You want this to go in, do you, Mr. Wheeler?

Mr. WHEELER.—Yes, I want it to go in. We don't admit that Mr. Thane is out of it, and you offer that document to prove that he is out of the transaction.

Mr. COOKE.—In behalf of defendants other than Mr. Loring, we object to the admission in

(Testimony of David Taylor.)

evidence of the paper offered, upon the ground that it affirmatively appears from the evidence that Mr. Thane [271—267] had an interest in the subject-matter of the contract, and was not made a party with the plaintiff Taylor; and this so-called assignment of date September 11, 1920, is after the commencement of the suit, and not a release existing at the time the suit was commenced.

The COURT.—That is the 11th day of September, this year?

Mr. THATCHER.—Yes, your Honor; I am going to supplement that with a letter.

The COURT.—Very well, the paper will be admitted for what it is worth.

(The release, dated September 11, 1920, is marked Plaintiff's Exhibit 30.)

Mr. THATCHER.—I think that is all, if the Court please.

Recross-examination.

Mr. WHEELER.—(Q.) Did you pay to Mr. Thane any money consideration for executing to you on the 11th day of September, 1920, the document just offered in evidence, whereby he purports to release to you any claims or matters involved in this suit? A. No, sir.

Q. In order that your Honor may be mindful of the course of the examination, I will read this aloud to you: (Reads Plaintiff's Exhibit No. 28.) "Reno, Nevada, August 10, 1919. W. J. Loring, Crocker Building, San Francisco. Reno newspaper reports dispatch from Inlay stating you

(Testimony of David Taylor.)

have bought Friedman tungsten interests in Mill City district. Would appreciate your wiring early Monday as to what if any Nevada Humboldt interests you have bought. The companies and stockholders owe me considerable money and my attorneys consider I have good case for compelling present stockholders assign to me control of stock of both companies or as alternative heavy damages. My actions will largely depend on what if any interests you may have as I don't want involve you in this mess. Wire care George Thatcher, Reno. David Taylor." And the answer [272—268] thereto; (Reads Plaintiff's Exhibit No. 29:) "San Francisco, Calif., August 11, 1919. David Taylor, Care Geo. Thatcher, Reno, Nev. I hold option on Nevada Humboldt interests. W. J. Loring." I call your attention to the portion of the telegram, Plaintiff's Exhibit 28, wherein you say "The companies and stockholders owe me considerable money and my attorneys consider I have good case for compelling present stockholders assign to me control of stock of both companies or as alternative heavy damages." Did you ever prior to the institution of the present suit, institute a suit for damages for breach of the contract Exhibit "C"?

Mr. THATCHER.—Objected to as not cross-examination.

Mr. WHEELER.—He claims this is notice.

The COURT.—I will sustain the objection. I do not see, Mr. Wheeler, where that suit comes in as

(Testimony of David Taylor.)

part of the notice; he is simply offering this to show notice.

(Discussion.)

The COURT.—I shall adhere to the ruling.

Mr. WHEELER.—(Q.) Did you on the 9th day of August, 1919, make oath to a complaint in damages. I show you a document purporting to be a complaint filed in this court, being number 2263, and ask you if the signature to the verification thereto attached is your signature?

Mr. THATCHER.—Objected to as not cross-examination.

Mr. WHEELER.—Merely preliminary, your Honor.

The COURT.—Oh, I will let him answer that, but when it comes to introducing that document.

Mr. WHEELER.—Your Honor understands I am making a record on this matter.

WITNESS.—Yes, that is my signature.

Mr. WHEELER.—(Q.) You signed that document on the 9th day of August, 1919?

A. I should say I did, yes.

Q. I call your attention to the fact that the telegram addressed [273—269] by you to W. J. Loring is dated the 10th day of August; had you already signed the document just exhibited to you, the verification of August 9th, prior to sending the telegram, Exhibit 28?

Mr. THATCHER.—Object to it as not cross-examination.

(Testimony of David Taylor.)

The COURT.—I will sustain the objection on the ground it is not cross-examination.

Mr. WHEELER.—As a part of the cross-examination of the witness we offer in evidence the bill of complaint at law in action number 2263 in this court.

The COURT.—It will be the same ruling.

Mr. WHEELER.—(Q.) Did you ever send any other or different written notice of any kind or character to Mr. Loring than the one just identified?

A. I wrote him a letter three or four days afterwards, maybe a week after, when I returned to Denver.

Q. Have you a copy of the letter?

A. I think so, yes; there is one in the files.

Mr. WHEELER.—The letter I am speaking of is at the hotel. I notice it is 12 o'clock.

(At 12:00 o'clock a recess is taken until 1:30 P. M.)

AFTER RECESS—1:30 P. M.

Examination of Mr. DAVID TAYLOR Resumed.

Mr. THATCHER.—I would like to ask the witness some questions on redirect, if the Court please.

Q. Mr. Taylor, is that a copy of the letter which you sent to Mr. Loring? A. Yes.

Mr. THATCHER.—We offer it in evidence.

(Letter dated August 10, 1919, from David Taylor to W. J. Loring is marked Plaintiff's Exhibit No. 31.)

(Testimony of David Taylor.)

Q. Mr. Taylor, you testified yesterday that you had written some [274—270] letters to the Crucible and other people with reference to this property? A. Yes, sir.

Q. And you testified in response to a question of Mr. Wheeler's as to whether or not you had ever used any other figures in your representations than 60,000 tons, that you had used forty-one or forty-three thousand tons? A. Yes.

Q. I call your attention to a copy, or what purports to be a copy of a letter on the letter-head of the Consolidated Ores Company, and ask you if you ever saw that before? A. I did.

Q. What is it?

A. It was written by me to the Crucible Steel Company of America.

Q. And does it concern this property, the Nevada Humboldt Tungsten Mines Company property?

A. It does.

Q. What date is it? A. April 17, 1919.

Mr. THATCHER.—We offer it in evidence.

Q. Mr. Taylor, I call your attention to another letter addressed to Roy C. McKenna, Vanadium-Alloys Steel Company, Latrobe, Pennsylvania, of the same date, April 17, 1919, and ask you if you wrote that letter? A. Yes, sir.

Q. Is that a copy of it? A. Yes, sir.

Q. Where is the original, was it mailed?

A. Yes, the original was mailed.

Q. And the same is true of the other letter, was the original of that mailed? A. Yes.

(Testimony of David Taylor.)

Q. And does that concern the Nevada Humboldt Tungsten Property? A. It does.

Mr. THATCHER.—We offer that in evidence.

Mr. WHEELER.—There will be no objection to either of these letters.

(Letters from David Taylor to Crucible Steel Co. of America, dated [275—271] April 17, 1919, is marked Plaintiff's Exhibit No. 32. The letter from David Taylor to Roy C. McKenna, Vanadium-Alloys Co., is marked Plaintiff's Exhibit No. 33.)

Mr. WHEELER.—I would like the Court to have this before it: The two letters are identical, and each contains the following statement: "The result is now an assured minimum of 43,000 tons of ore"; that is dated April 17, 1919; the point being there is no mention of 60,000 tons.

Mr. THATCHER.—The point being that he represented an assured minimum of 43,000 tons. I would like to have the privilege of calling the witness again on direct examination to identify some telegrams and letters.

Mr. WHEELER.—There will be no objection.

Mr. THATCHER.—(Q.) Mr. Taylor, I call your attention to a telegram of date January 22d, from Mr. Poole.

Mr. WHEELER.—It seems to be dated January 21st; do you offer the telegram?

Mr. THATCHER.—Yes.

Mr. WHEELER.—It is objected to as incompetent, irrelevant and immaterial; it does not seem

(Testimony of David Taylor.)

to have any bearing on the case, dated January 21, 1919.

Mr. COOKE.—We also object to it as to all other defendants except the defendant Poole, as to any evidential value.

Mr. THATCHER.—My purpose in introducing it was to show that Mr. Poole knew of the plan of development outlined in the Bancroft report.

Mr. WHEELER.—I think nobody disputes that. My understanding is, if I am wrong I trust my associates will correct me, when Mr. Bancroft was there, or rather in his report, he advised a plan of development, and that was known, that he also discussed it with Mr. Poole, and that Mr. Poole therefore knew what Mr. Bancroft's [276—272] suggestions were; and I understand that the work that went forward in the mine was pursuant to Mr. Bancroft's plan; and I think that was what Mr. Bancroft meant when he found that the development work done was satisfactory, in accordance with his plan.

Mr. THATCHER.—Do I understand you are willing to admit that as stated, Mr. Cooke?

Mr. COOKE.—Yes, sir.

Mr. THATCHER.—Well, I offer the telegram for the further purpose of showing that Mr. Poole was familiar with the mine and had knowledge of mine conditions, which is denied by the allegations.

Mr. WHEELER.—It would indicate on January 21st he knew some things set forth in the telegram,

(Testimony of David Taylor.)

but that would not tend to prove his knowledge of the mine.

The COURT.—Was not your admission that Mr. Poole understood the plan of development, and that he carried it out in the mine? It seems to me if that is the admission, it is almost an admission that he understood the mine, and was familiar with it.

Mr. COOKE.—The admission is that the work was done pursuant to the plan of development outlined by Mr. Bancroft.

The COURT.—I think I will admit this telegram.

(Telegram from C. W. Poole to David Taylor, dated January 21, 1919, is marked Plaintiff's Exhibit No. 34.)

Mr. THATCHER.—I don't want to have to offer all these to the witness, if we can agree on it.

Mr. WHEELER.—What is the purpose of the offer?

Mr. THATCHER.—The purpose of the offer is to show Mr. Poole's connection with the mine; I understand it is denied that he was in general charge of mining operations.

Mr. WHEELER.—What is the issue upon that point?

Mr. THATCHER.—My recollection is that defendants deny that.

Mr. WHEELER.—You have an allegation that certain facts were peculiarly within the knowledge of defendants, and I think that is [277—273] denied; I don't think Mr. Poole's connection with the mine is denied.

(Testimony of David Taylor.)

Mr. THATCHER.—There is also an allegation that Mr. Poole was in a general charge of the mining operations of the property.

Mr. COOKE.—We object to this; it is incompetent and immaterial, does not prove the matter stated by counsel, and it is not legal proof of it in any event; it simply purports to be a statement by H. J. Murrish in a letter to one Pettigrew; any statement of Murrish as to what Poole knew or didn't know would not be evidence as to the fact, and not proper evidence to establish the fact; that Murrish may have written it in a letter to anybody, or made a statement to anybody.

Mr. THATCHER.—So that we can save a little time, I presume counsel will admit that during all of these times Mr. Friedman was president and a director of this corporation; that Mr. Murrish was a director and vice-president; that Mr. Rudolph Nenzel was a director and secretary;—and who were the other directors?

Mr. COOKE.—Will you state them from where you are, Mr. Nenzel?

Mr. NENZEL.—I could not offhand on those dates.

Mr. COOKE.—What dates are you referring to?

Mr. THATCHER.—From January 16th to June 2d.

Mr. COOKE.—We can supply those; if we can't do it immediately, we will shortly.

Mr. THATCHER.—At any rate Murrish was vice-president and director at all of the times,

(Testimony of David Taylor.)

there is no question about that, I believe.

Mr. COOKE.—I rather think that is correct, but I don't know that it is the fact.

Mr. THATCHER.—I think Mr. Poole's connection is the only thing in which there was a change.

The COURT.—I will sustain the objection to that offer.

Mr. THATCHER—I would like to have it marked for identification. I think I will put all of these together, and have them all marked as [278—274] *as* one exhibit.

The COURT.—Are there some here that will be admitted, and others possibly not?

Mr. COOKE.—They are all subject to the same objection.

Mr. WHEELER.—Your Honor has ruled out that one of May 5th, addressed to Percy L. Pettigrew, and signed Murrish. I can see no relevancy whatever in any of the letters offered; they appear to be letters to certain defendants to the action—if counsel will point out the relevancy.

Mr. THATCHER.—My contention with reference to that, if the Court please, is that the answer denies that Mr. Poole had any knowledge of the mine itself, and the answer also denies that Mr. Poole was peculiarly informed as to the conditions in the mine. The purpose of these letters is to show that Mr. Poole did know the conditions of the mine, and, further, that the defendants recognized him as the one in charge of the mine, and in general charge of mining operations.

(Testimony of David Taylor.)

The COURT.—Do you contend those letters are competent proof of that fact?

Mr. THATCHER.—Some from Mr. Poole, some from Mr. Nenzel, and some from Mr. Friedman; in other words, that the other defendants all recognized Mr. Poole as the man in general charge.

Mr. COOKE.—We interpose the specific objection that the letters do not prove or tend to prove what counsel claims; and, secondly, that the statements between all these defendants as to what the other defendant knew or didn't know, or was doing or wasn't doing, would not be evidence in the case. Only one of these letters is signed by Mr. Poole; we don't make that objection to that particular letter, but object to it on the ground it is incompetent, and does not prove the matter that counsel refers to.

The COURT.—You may attach those all together and mark them as one exhibit; they will go into the record, but not as exhibits. I [279—275] will examine them later.

Mr. THATCHER.—I particularly would like to have the one of January 24th, for all purposes.

The COURT.—Separate that one, if you wish.

(The several letters attached are marked Plaintiff's Exhibit No. 35 for identification, and the letter dated January 24th, is marked Plaintiff's Exhibit No. 36, for identification.)

Mr. WHEELER.—Counsel, as I understand, offers the whole of each letter, and to each and every one of them, and each phrase and statement in each letter we make the objection it is incompetent, ir-

(Testimony of David Taylor.)

relevant and immaterial, self-serving, hearsay, *res alias actae*. We can see nothing in them that bears out counsel's theory. Some of these letters were written in January, a very distant date to the transactions here involved.

The COURT.—Of course if a document of that kind is rejected, it still remains part of the record.

Mr. THATCHER.—I understand your Honor will take the time to read them over.

The COURT.—If they become important, I certainly will, and if I think they are proper I will admit them.

Mr. COOKE.—There is no objection on our part to having the Court act on them later on. Your Honor can use them later on, as far as we are concerned, if you find anything in them that has any bearing.

Mr. WHEELER.—There will be no objection to the Court changing its ruling in our absence if we may have an exception. Here is a statement that Mr. Murrish hands me which shows the directors of some of these corporations.

Mr. THATCHER.—Then it may be admitted that the directors of the Nevada Humboldt Tungsten Mines Company from January 16, 1919, to July 2, 1919, were L. A. Friedman, C. H. Jones, R. Nenzel, H. J. [280—276] Murrish, and John G. Huntington. Were those the directors at all times; was Mr. Poole a director at all during that time?

Mr. MURRISH.—The dates are there.

Mr. DAVIS.—He was not a director.

(Testimony of David Taylor.)

Mr. THATCHER.—At any time?

Mr. DAVIS.—No.

Mr. COOKE.—Mr. Murrish explains that the directors of the Tungsten Humboldt Products Company were the same as the Nevada Humboldt Tungsten Mines Company, but not covering the same period; the Tungsten Products Company was not organized until in May, 1919, so that period would be from some date in May, 1919, to July 22, 1919.

Mr. WHEELER.—How about the Mill City Development Company?

Mr. THATCHER.—I will accept your statement.

Mr. WHEELER.—It is understood that the directors of the Mill City Development Company from the incorporation thereof, were W. J. Loring, C. H. Segerstrom and L. A. Friedman.

Mr. COOKE.—Is that for the same period, from January to July?

Mr. DAVIS.—That is up to August 23, 1919; and after that there was some one else in place of Mr. Friedman, C. H. Beasley, I believe.

Mr. THATCHER.—It can be admitted that the letter of August 22, 1919, addressed to the Nevada Humboldt Tungsten Mines Company, and other defendants, which appears in the form of a letter, was mailed to each of the defendants on the date of the letter by George B. Thatcher, acting as attorney and proxy for David Taylor, then a stockholder of the Nevada Humboldt Tungsten Mines Company, and I offer it in evidence.

(Testimony of David Taylor.)

(Notice dated August 22, 1919, is marked Plaintiff's Exhibit No. 37.)

Mr. COOKE.—(Q.) You stated, Mr. Thatcher, that was mailed to each of the defendants; I am not sure. While it may not be so material, I don't believe that is correct. It may have been mailed [281—277] so far as I know, but I don't think it was received by each of them.

Mr. THATCHER.—I can't say as to that. I sent it. I don't want to testify, Mr. Cooke.

Mr. WHEELER.—I desire to call your Honor's attention to the fact that there is nothing whatever in this notice suggesting that any case for specific performance of the contract was to be brought; it was merely a protest against holding a meeting on August 23d, 1919, to ratify certain contracts with Mr. Loring.

Mr. THATCHER.—That is correct. I offer in evidence a demand made upon the corporation Nevada Humboldt Tungsten Mines Company and its board of directors, or what I assume to be its board of directors, which included Mr. Poole, demanding that they commence action in the proper courts to set aside the contracts, deeds and conveyances made to Mr. Loring under the contract between the corporation and Mr. Loring, of date August 16, 1919. I merely expect to show that that was sent to the parties therein named.

Mr. WHEELER.—We make the objection that as against the defendant Loring it is incompetent, irrelevant and immaterial.

(Testimony of David Taylor.)

Mr. THATCHER.—You don't object on the ground of its not having been properly identified or testified to?

Mr. WHEELER.—No, your statement that the notice was sent is accepted by me as a fact, but I do not admit that notice should be received in evidence. You offer this as a document which you did send, and I admit you sent the document, but I object to the admission of the document in evidence upon the grounds stated.

Mr. COOKE.—In behalf of the other defendants we make the same objection; it is incompetent and irrelevant; it does not prove or tend to prove any issues in the specific performance suit, and is not responsive to any of the issues made by the pleadings in this case. [282—278]

Mr. THATCHER.—Of course we have alleged in our complaint that in addition to entering into this contract and the performance thereof, that certain contracts were executed to Mr. Loring, and we have alleged that they were executed pursuant to a meeting of stockholders held on the 16th day of August, without sufficient notice under the laws of the state of Nevada, only seven days, notice having been given, and fifteen days being required under the statute

Mr. COOKE.—So far as we are concerned, we move to strike the allegation on the same grounds stated in my objection; we have denied it, and also move to strike it—I won't say we denied it, I don't think we deny sending the notice, but we

(Testimony of David Taylor.)

have stated in our answer the allegation is frivolous.

The COURT.—Well, if it is immaterial and frivolous, I don't think it makes much difference whether it goes in or not, from your point of view, and in order to save time it may go in.

Mr. THATCHER.—We merely want to offer it for the purpose of showing we did make a demand on the managing board of the corporation to set aside the conveyances made to Mr. Loring pursuant to the meeting of the directors and stockholders held on the 16th day of August; and we offer a demand upon the stockholders of the same character and for the same purpose.

Mr. WHEELER.—I think that is denied by Mr. Loring, your Honor.

Mr. COOKE.—We make the formal objection it is incompetent, irrelevant and immaterial, does not prove or tend to prove any material issue in this specific performance suit.

Mr. THATCHER.—It is offered for the purpose of showing the demand was made and when it was made.

The COURT.—The ruling will be the same.

Mr. WHEELER.—It probably is hardly necessary to call the [283—279] Court's attention to the fact the demand in question is not a demand to set aside this contract on the ground plaintiff is entitled to 62 per cent of the stock; the demand is to set it aside because of the informality of the meeting at which it was authorized.

(Testimony of David Taylor.)

The COURT.—At the present time I don't see that the evidence is very important, but of course I can't tell just what Mr. Thatcher has in mind; so the quickest way to dispose of it is to let it in, and if it don't amount to anything, I will not have to consider it.

(Notice to the Nevada Humboldt Tungsten Mines Company and the Board of Directors is marked Plaintiff's Exhibit No. 38; and the notice to Stockholders is marked Plaintiff's Exhibit No. 39.)

Mr. THATCHER.—You may cross-examine.

Cross-examination.

Mr. WHEELER.—(Q.) You testified this morning that you told Mr. Loring in New York in substance, that you intended to bring suit, did you ever bring such a suit? A. Yes, sir.

Q. I hand you the complaint in action number 2263, the verification of which was identified by you this morning, and ask you whether or not that is the suit referred to by you?

Mr. THATCHER.—Objected to as not cross-examination.

The COURT.—It seems to me that is your case in chief.

Mr. WHEELER.—Your Honor sees it is not exactly the same proposition that was advanced this morning. The witness says in New York he is going to bring suit; he begins the suit, and I ask if this is the suit, and he says yes.

The COURT.—No, I shall sustain the objection.

Mr. WHEELER.—(Q.) This afternoon there has

(Testimony of David Taylor.)

been admitted as an exhibit in your case, Mr. Taylor, what purports to be a press copy of a letter from you to Mr. Loring; is that the letter referred to [284—280] by you this morning in your examination? A. Yes, sir.

Q. I call your attention to Plaintiff's Exhibit 31, dated Reno, Nevada, August 10, 1919; is that the letter referred to by you this morning as having been sent by you to Mr. Loring? A. Yes.

Q. Now the letter and the telegram are the only communications in writing of any kind or character that have passed between you and Mr. Loring, aren't they? A. No.

Q. I mean at any time prior to the 11th day of August? A. I think so, yes, sir.

Q. Subsequent to the 11th day of August have any passed between you?

A. I think I wrote Mr. Loring one letter returning a bill to him which was sent to Mr. Bancroft, and which Mr. Bancroft sent to me.

Q. That is all, nothing in the shape of notification of any sort? A. No, sir.

Q. So the only time you have ever called Mr. Loring's attention to your revelations with the defendants, or any or either of them; first, this conversation in New York, testified to by you this morning; second, a telegram from you to Mr. Loring offered this morning; and third, this letter dated August 10th, being Plaintiff's Exhibit 31?

A. Yes, in addition to that I went over fully with

(Testimony of David Taylor.)

Mr. Loring's managing clerk in the San Francisco office, the situation.

Q. What date are you talking about?

A. Some time the beginning of June, 1919.

Q. You had no talk with Mr. Loring? A. No.

Mr. WHEELER.—I move the answer of the witness that he went over the situation with Mr. Loring's managing clerk, be stricken out.

Mr. THATCHER.—No objection.

The COURT.—That may go out.

Mr. WHEELER.—I will read this letter to your Honor, I think it [285—281] should be in your mind: (Reads Plaintiff's Exhibit 31:) "Reno, Nevada, August 10, 1919. W. J. Loring, Esq., San Francisco, Cal. Dear Mr. Loring: You were probably surprised to receive my telegram. The telegram, however, was occasioned by an article appearing in the Reno Gazette last evening, a clipping of which I enclose herewith. I have since been informed that the article is not authentic, but in view of our talk in New York, when I had the pleasure of breakfasting with you, in all fairness, I thought it proper to advise you of the situation. I am leaving tonight for Denver and am then going to take a short fishing trip near Aspen, Colorado, and hope to get back and find tungsten \$25.00 per unit and going strong. Faithfully yours, David Taylor."

(By Mr. COOKE.)

Q. Mr. Taylor, did you ever make a proposition to the defendants in this case for a modification

(Testimony of David Taylor.)

of the April 2d contract, wherein there were any conditions with reference to prorating any money that you might pay among the creditors, other than the document that you presented to them down in San Francisco about June 7th?

A. I don't think I did, no, sir.

Q. Isn't it a fact that about the same time you presented that document to them for their action by way of modifying the April 2d contract, you were making efforts to purchase the outstanding indebtedness, or some of it?

Mr. THATCHER.—Objected to as not cross-examination.

Mr. COOKE.—Well, we think it is cross-examination with reference to the modifications and the attitude of the plaintiff as to whether he was willing to do equity or not at that time. Counsel urged that as a reason for some evidence that he asked, and it seems to me that this testimony would have a bearing upon the same feature. [286—282]

The COURT.—I will sustain the objection to that.

Mr. COOKE.—(Q.) For the purpose of the record only, I will ask you, Mr. Taylor, if it is not a fact that you did purchase one account of \$299 and some cents, from Hugh Watts of Boulder?

Mr. THATCHER.—Objected to as not cross-examination.

The COURT.—Objection sustained.

Mr. COOKE.—(Q.) Just one more question on that same line; Isn't it a fact that you endeavored to purchase the accounts of the Rochester Mining

(Testimony of David Taylor.)

Company and the Rochester Merger Mining Company against the Nevada Humboldt Tungsten Mines Company?

Mr. THATCHER.—Objected to as not cross-examination.

Mr. COOKE.—I would like to add, and that it was your intention to use those accounts that you obtained for the purpose of coercing the defendants into accepting the modified contract that you proposed?

Mr. THATCHER.—Objected to as not cross-examination.

The COURT.—Objection sustained.

Mr. COOKE.—(Q.) Mr. Taylor, along about May 20th, 1919, you were in New York City, were you not? A. Yes, sir.

Q. And Mr. Poole was also there? A. Yes, sir.

Q. And you and he met quite frequently and discussed the affairs of the mine, did you not?

A. We did meet frequently, no, we met once or twice.

Q. You met twice there and talked over matters of the mine? A. Yes.

Q. Do you recall having a conversation with Mr. Poole in New York City along about May 20th, 1919, in which the subject matter of the request of Mr. Nenzel for an advance of \$20,000 was presented to you by Mr. Poole? By Mr. Nenzel on account of the concentrates contract, an advance of \$20,000; this is simply for the purpose of calling

(Testimony of David Taylor.)

your attention to the circumstances, if I can. [287—283]

A. I don't remember, it may have been done; there were a good many such requests made.

Mr. THATCHER.—No, a conversation.

A. I don't remember, no, sir.

Mr. COOKE.—(Q.) You don't remember.

A. No, sir.

Q. Well, do you remember whether there was any such circumstances came up between you and Mr. Poole in New York City along in the month of May, 1919? A. I don't remember.

Q. You don't recall the matter at all? Do you recall having a conversation with Mr. Poole in which he told you, in substance, that Mr. Nenzel was very anxious to get an advance from you on behalf of the company of \$20,000 on your ore concentrate contract, and you replied to Mr. Poole, stating that you would not advance that until you had an examination of the property made?

A. I do not remember, no, sir.

Q. Would you say that such a conversation was not had? A. No.

Q. It might have been had?

A. I don't remember anything about any conversation in connection with advances, particularly at that time.

Q. Do you remember of telling him there that before you would make any further advances, that is, any advances on this ore concentrate contract

(Testimony of David Taylor.)

that you would have to have an examination of the mine property? A. No, sir, I do not.

Q. You would not say that you did not say that?

A. No.

The COURT.—What time was that?

Mr. COOKE.—May 20th, about May 20, 1919.

Q. Mr. Taylor, the telegram that you sent to Mr. Loring, in which you told him, in effect, that your attorneys advised you that you had a claim, or several claims, which you might urge against the Nevada Humboldt Tungsten Mines Company, that was dated August 10th, 1919, that is correct, is it, or do you recall the date—do you recall [288—284] the date of that telegram?

A. August 9th or 10th, I am not sure; I think it was August 9th or 10th I sent it the date it stated.

Mr. WHEELER.—It is in evidence. It is dated August 10th; the reply is dated August 11th.

Mr. COOKE.—(Q.) At the time when you sent that telegram, you knew as a fact that you had verified a complaint against Mr. Friedman and the other defendants, claiming something over a hundred thousand dollars damages arising out of this transaction, had you not?

Mr. THATCHER.—Objected to as not cross-examination.

Mr. COOKE.—It is preliminary to another question I want to ask.

The COURT.—Well, I will allow him to answer that categorically.

A. I could answer that in this way, sir, that the

(Testimony of David Taylor.)

dates under my signature verifying the complaint would show; I don't remember now the date at which the complaints were signed.

Mr. COOKE.—(Q.) Irrespective of the dates, don't you know at the time you sent that telegram you had verified this complaint in the damage suit against the parties I have named?

Mr. THATCHER.—Objected to as not cross-examination.

The COURT.—I will sustain the objection.

Mr. COOKE.—(Q.) Why didn't you tell Mr. Loring in that telegram that you had already taken steps to commence that suit?

Mr. THATCHER.—Objected to as not cross-examination.

The COURT.—Objection sustained.

Mr. COOKE.—(Q.) Were there any reasons in your mind, Mr. Taylor, why you should conceal or keep back the information that you had already decided to sue these people for \$140,000 damages?

Mr. THATCHER.—Objected to as not cross-examination.

The COURT.—Objection sustained.

Mr. COOKE.—(Q.) You have referred to two letters, one to the [289—285] Crucible Company and another to some Vanadium Company; did you address communications to any other company or individual other than those you have already referred to in your testimony, in which you stated the approximate tonnage in the mine there at any

(Testimony of David Taylor.)

amount less than 60,000 tons, or any other tonnage than that?

A. I may have done so, I don't remember.

Q. Well, when you say you may have done so, is it your recollection that you probably did?

A. No, sir.

Q. Do you recall at this time any letter or telegram or communication of any kind to anybody else, where you referred to the tonnage of the mine in any given amount, any given number of tons?

A. I do not, with the exception of a prospective that was prepared and submitted to a good many people.

Q. Was the tonnage given in that prospectus?

A. It was either forty-one or forty-three thousand, I don't remember.

Q. Have you that prospectus with you here, Mr. Taylor? A. I think so.

Mr. COOKE.—We would like to see it, Mr. Thatcher.

Mr. THATCHER.—Is that it, Mr. Taylor? (Hands paper to witness.) A. Yes, in part.

Q. Is there any part that don't belong to it?

A. Yes, that does not belong to it.

Mr. THATCHER.—I will take that off.

Mr. COOKE.—This prospectus does not seem to be dated.

Q. Can you tell anything about the date when it was finally prepared? A. When it was what?

Q. I say can you tell anything about the date

(Testimony of David Taylor.)

when it was finally prepared, the date or approximate date when it was prepared?

A. Its approximate date was the beginning of May, prepared by Mr. Thane or me on the way to New York. [290—286]

Q. Beginning of May, 1919? A. Yes.

Mr. WHEELER.—(Q.) You did the work on the train, didn't you, as you went along? A. Yes.

Mr. COOKE.—(Q.) Was this report prepared in full from the date you compiled together there on the train? A. Will you repeat that question?

Q. Was this report made up from the data you had with you on the train there at the time?

A. Yes, part of it was made up from data Mr. Thane had.

Q. Where was it finally typewritten and reduced to its final form?

A. The final copy was typewritten by the stenographer on the train; whether that is the particular copy that was typewritten, I am not sure; there were a number of copies made.

Q. How many copies, approximately, did you have made of this prospectus?

A. I guess ten or twelve, I don't know.

Q. And were any of the other copies used with parties that you thought you might interest in this venture?

A. Yes, sir, that was used as a basis of my attempt to raise money in New York.

(Testimony of David Taylor.)

(By Mr. WHEELER.)

Q. The page that was on here as first presented, was what?

Mr. THATCHER.—Objected to as not cross-examination.

Mr. WHEELER.—(Q.) Had it no relation to this, was it not a part of this?

A. No, sir, it was not part of the prospectus.

Q. Was it a document prepared by Mr. Thane and yourself on the trip? A. Was it what?

(The reporter reads the question.)

A. I don't believe so, I don't know when it was prepared.

Q. It seemed to have been incorporated with this; are you positive that it was not a part of it?

A. I am positive that it was not presented to people as the prospectus. [291—287]

Q. I understand, but wasn't it part of the prospectus prepared by you and Mr. Thane on the trip, whether subsequently presented to people or not? A. I do not remember, sir.

Q. Look at it again, please, and see. (Hands paper to witness.)

Mr. THATCHER.—You can have it if you really want it.

Mr. WHEELER.—If it is part of it I want it; if it is evidence, I want it. I am trying to find out whether or not we have the full document that was prepared on the train.

Mr. THATCHER.—He testified to that, and that is why I took it off.

(Testimony of David Taylor.)

(The paper is handed to counsel for defendants by Mr. Thatcher.)

Mr. WHEELER.—(Q.) Examine the document which I now show you, "Proposed capitalization," and state whether or not that document, or its basis, was prepared by Mr. Thane and yourself on the train on the way to New York?

A. I could not tell you, sir.

Q. What is your best recollection of it, a document that comes from your possession?

A. My best recollection would be that this document shows on its face that Mr. Brown has subscribed for ten thousand; Mr. Brown did not definitely subscribe for ten thousand until after I returned to Denver, therefore I should say this was prepared after I returned to Denver; the general outline was prepared on the train. That is the only possible way I can tell you it was prepared.

Mr. WHEELER.—We offer the two documents.

(The paper headed "Memorandum No. 3," is marked Defendant's Exhibit "U," and the paper headed "Proposed Capitalization" is marked Defendant's Exhibit "V.")

Mr. WHEELER.—I call your Honor's attention to the following portion of Exhibit "U:" (Reads) [292—288] "Examination: Property examined July 1918 by F. L. Hyder, now Assistant in Bureau of Mines at Washington, for B. L. Thane; and January 17—27, 1919, by Howland Bancroft, Mining Geologist of Denver, for David Taylor;

(Testimony of David Taylor.)

both making favorable reports. Geology and character of disposition of ore such that there is reasonable assurance of continuation of ore in depth to bed of enclosing granite basin, estimated between 1000 and 1500 feet, or 600 to 1100 feet deeper than bottom of present shaft; and, latterly, for full length of outcrops, in proportion, as milling grade now appears on surface.

“At date of Hyder’s examination, practically no ore fully developed. Mill under construction, operations being confirmed to immediate mining and shipping. At date Bancroft examination, mill operating full capacity and development progressed so that 8,111 tons of 1.75% ore in sight. Bancroft advised program of development, to be finished July 1st, 1919, which from indicated ore, he estimated should fully develop 157,000 tons by that date. This program now being diligently carried out. On April 1, new survey of this work indicated ore reserve of 41,000 tons, or an increase of 32,000 tons since January 27, with bottom of shaft and all faces of drifts showing good values.”

And I call attention to Defendant’s Exhibit “V,” headed “Proposed Capitalization.” Both may be considered read.

Q. Mr. Taylor, when a certain telegram was presented to you here upon the stand, in which you stated that your father’s subscription was \$20,000, you said it was a typographical error; when a certain letter was presented to you on the stand, say-

(Testimony of David Taylor.)

ing that your father's subscription was \$20,000, you said it was a typographical error.

Mr. THATCHER.—No, he didn't say typographical error.

Mr. COOKE.—No, he said it was an error.

Mr. THATCHER.—And he explained the situation later. [293—289]

Mr. WHEELER.—(Q.) I now hand you Defendants' Exhibit "V," and call your attention to the following: "Present Lineup Stock Ownership F. M. Taylor 20,000, D. R. C. Brown, 10,000, B. L. Thane 25,000, David Taylor, 95,000—150,000," F. M. Taylor, 20,000, was that also an error?

A. Mr. Taylor's subscription was 25,000; how the question of 20,000 came up I could not tell you at this time, I don't remember.

Mr. WHEELER.—That is all.

By Mr. COOKE.—(Q.) On the last page of this paper marked Exhibit "U" is the following in parenthesis: "For confirmation data see accompanying reports"; what reports does that refer to as accompanying this paper?

A. I showed Mr. Bancroft's report with that, properly explaining the map and plates, showing how the mine was to be developed, and how and where the 157,000 tons was to come from, and the developments up to that time as given me by Mr. Poole in Denver.

Q. And the term "accompanying reports" was intended to refer to the Bancroft report only, and nothing else?

(Testimony of David Taylor.)

A. As far as I know, yes, sir; I may possibly have had some statement, no other mining report.

Q. Whose writing is that in lead pencil there?

A. Mine.

Q. "See attached memo." is that what that reads—excuse me for not being able to read it more readily? A. Yes.

Q. What attached memo. does that refer to; where is the memo that was attached?

A. I don't know; I should say that referred to that other paper that was attached there.

Q. This one here showing the proposed capitalization?

A. Yes, it states "Attached memo." was put in there, and showed with the preferred stock would be a bonus of common stock, something like that.
[294—290]

Mr. COOK.—I think that is all.

Mr. THATCHER.—Are you through with the examination for the present?

Mr. COOKE.—Yes, that is all.

(A short recess is taken at this time.)

Redirect Examination.

Mr. THATCHER.—(Q.) Mr. Taylor, I call your attention to Exhibit "U," that is the prospectus which was made up by you and Mr. Thane on the train? A. Yes.

Q. I call your attention also to exhibit 32, in which you state that there is an assured minimum

(Testimony of David Taylor.)

of 43,000 tons; why did you in that letter use the tonnage of 43,000 tons?

Mr. COOKE.—We object.

Mr. WHEELER.—Objected to as incompetent, irrelevant and immaterial, and not redirect examination.

Mr. THATCHER.—I want to show why he made those representations in that form.

The COURT.—I will allow the question. To what issue does that go, Mr. Thatcher?

Mr. THATCHER.—Merely the question that he relied upon the representations, and made them in turn to others, representations which had been made to him.

Mr. WHEELER.—The issue in the complaint is that the representation was 60,000 tons.

Mr. THATCHER.—That is true, and this is not inconsistent with it at all, an assured minimum of 43,000 tons.

Mr. COOKE.—In the light of counsel's statement, we specially object that the evidence is incompetent.

Mr. THATCHER.—That is their contention; I want to show why he used the words 43,000 tons [295—291]

The COURT.—I will allow you to ask the question.

Mr. THATCHER.—(Q.) Why did you use the words in the letter to the Crucible Steel Company, Plaintiff's Exhibit 32, "assured minimum 43,000 tons"?

(Testimony of David Taylor.)

A. Because that was sufficient ore on any possible price, any probable price of tungsten, to make adequate security for the money to be advanced; also we wanted to be very conservative, and be sure that any examinations that any possible buyer would ever want to make would substantiate at least what we claimed.

Q. I now call your attention to defendants' Exhibit "U"; in that you state on page 2, paragraph 3, "41,000 tons of fully developed ore on April 1, 1919"; why did you use 41,000 at that time?

Mr. WHEELER.—Same objection.

The COURT.—Same ruling.

A. For the same reason.

Mr. THATCHER.—(Q.) Why the difference between 43,000 to the Crucible Steel Company and 41,000 in the prospectus which you prepared?

A. I didn't remember exactly what had been said in their letters, I didn't have any other letters with me on the train; the necessary tonnage to protect the loan was figured out.

Q. By whom? A. At the time.

Q. By whom?

A. Probably by me, possibly by Mr. Thane; we figured it together probably.

Q. Do you remember exactly how that was arrived at?

Q. Approximately, yes; I don't know whether I could check the exact figures again, I could come very close to it.

(Testimony of David Taylor.)

Q. Is that the reason why there was the difference between the 41,00 and the 43,000?

A. Yes, that is the only reason I know of.

Q. Mr. Taylor, your attention was called to a request from Mr. Poole on behalf of Mr. Nenzel on behalf of the corporation, for an [296—292] additional twenty thousand dollar loan in New York; do you know whether or not that conversation took place? A. I don't remember it, no.

Q. Do you know whether or not they requested an additional loan at that time—you say you don't recollect the conversation? A. No, I don't.

Q. Have you any recollection of Mr. Poole coming to you with reference to an additional twenty thousand dollar advance on the ore contract in New York. -

Mr. COOKE.—Objected to on the ground he has already answered that he does not recall it.

Mr. THATCHER.—Well, he might not recall it in that form.

The COURT.—He may answer the question.

A. I do not remember.

Mr. THATCHER.—That is all.

Recross-examination.

Mr. WHEELER.—(Q.) When you went to New York and met Mr. Thane on the train, I suppose you took Mr. Bancroft's report along with you?

A. Yes.

Q. And it had on it the map, I take it, that you have offered here in evidence as Exhibit 15?

(Testimony of David Taylor.)

A. Yes.

Q. And you and Mr. Thane on the train proceeded to figure out the quantity of ore, did you not? A. I did not, no, sir.

Q. Mr. Thane?

A. I don't know whether Mr. Thane did or not.

Q. I thought you testified a while ago that the difference in figures between your letter to the Crucible Steel Company of April 17th and that in the prospectus, was in one instance you did the figuring and in the other Mr. Thane did the figuring?

A. I think your question just before that asked if Mr. Thane had figured, or if we had figured out the ore according to that Bancroft [297—293] report; my explanation to that was we calculated that was enough ore to repay a loan.

Q. Did you not say that on the train, or is it the fact that on the train Mr. Thane and you had Mr. Bancroft's report with the map, your Exhibit 15 in this case, and that with that map before you, you figured the tonnage represented?

A. I did not so state; no, sir.

Q. What? A. I did not so state.

Q. I ask you if it was the fact?

A. It was not the fact, as far as I know; I don't remember whether Mr. Thane figured that or not; I can explain that if you will let me.

Q. Any explanation you make will be agreeable.

A. We were working on this prospectus from about half past two o'clock, or in the afternoon af-

(Testimony of David Taylor.)

ter lunch, on the Twentieth Century, we had three or four hours to draw up this prospectus and get it typewritten, with the presumption it would have to be corrected a number of times; we worked very fast, and parts of the report I prepared and parts Mr. Thane prepared; Mr. Thane prepared the part of the report dealing with the Hyder examination and mine developments, with the assistance of myself, on the market, and other various clauses in there; some were drawn by me and some were drawn by him.

Q. Who prepared the portion that said, a new survey of this work indicated ore reserve on April 1st of 41,000 tons?

A. Will you let me see the prospectus, I think I can tell you.

(Paper handed to witness.) Mr. Thane prepared all under the heading "Examination." Is that included in your question?

Q. Yes, because the portion I have just read is included under that heading, is it not?

A. No, What was your question, sir?

Q. The question is, did you or Mr. Thane prepare that?

A. Mr Thane prepared that entire paragraph, or two paragraphs. [298—294]

Q. Including the statement that a new survey on April 1st indicated an ore body of 41,000 tons?

A. Yes, sir.

Q. Where did he get the information?

(Testimony of David Taylor.)

A. I could not tell you.

Q. Don't you know that you had Bancroft's report with the map you have here presented, and you laid that before Mr. Thane, and on that he himself figured out 41,000 tons?

A. I can say yes to part of that question; the report was there and it was all before him.

Q. Well, it is your best belief that was the basis, is it not? A. It is not.

Q. Where did he get his information, if you know, that on April 1st there had been a survey, unless he got it from you and from the Bancroft report together?

A. It depends on what you mean by survey; he got his information as to conditions subsequent to the first Bancroft report from me.

Q. By survey I mean on April 1st new survey of this work indicated ore reserve of 41,000 tons; where did he get the information on which he made that statement, if you know?

A. From me; the word "survey" is not used there as a technical survey by instruments; it means general resume of the proposition.

Q. But he did get the information of 41,000 tons from you, didn't he? A. No, sir.

Q. You just said he did?

A. I said he got the report on the conditions of the mine from me.

Q. Where did he get the information on which he based the statement that there was 41,000 tons?

A. I don't know, sir.

(Testimony of David Taylor.)

Q. Do you know of anything else in the shape of information that he had before him, other than your oral statement and the Bancroft report, Exhibit 15, with the map, which you say was amended just [299—295] prior to entering into the contract, Exhibit "C," on April 2d?

A. He did not, so far as I know.

Q. As early as April the 17th you had sent out a letter saying the result is not an assured minimum of 43,000 tons of ore; who did the figuring in order to get that 43,000 tons?

A. I probably did it myself.

Q. Didn't you do it yourself?

A. I probably did it myself.

Q. Didn't you?

A. I don't know. I don't know whether I did it, or whether I gave the figures of the values, and market, and so on, to somebody else, and asked them to figure out how much tonnage would be necessary.

Q. You can't recollect anything about that, so you can't tell us definitely whether you did it or had somebody else do it? A. I cannot.

Q. You are capable of doing it, aren't you?

A. I am.

Q. And were on April 2d, were you not?

A. I was.

Q. What data did you have other than that you had on April 2d, when you made the figure 43,000 tons, or caused it to be made, that differed in any way from that which you had on April 2d?

(Testimony of David Taylor.)

A. The conditions of the tungsten market were changing from time to time; the exact figures I would use on figuring the necessary quantity of ore one day might not necessarily be the same a week afterward.

Q. So an assured minimum would be indicated by the price of tungsten and not by the quantity of ore in the mines, would it?

A. It would under those conditions.

Q. An assured minimum of 43,000 tons of ore is dependent, not upon what is in the mine, but upon the condition of the tungsten market, is that your answer? A. It is.

Q. Why was not an assured gross of 60,000 tons on April 2d, dependent on the condition of the tungsten market? [300—296]

A. 43,000 tons, a profit on mining 43,000 tons at the then market, and with the costs given, was sufficient to guarantee the security of the investment.

Q. I have not asked you about profits or anything else; you say the tungsten market has to do with the figures, an assured minimum of 41,000 tons, and I ask you why the tungsten market has any more to do with that than it has with an assured maximum of 60,000 tons? A. It has not anything more.

Mr. WHEELER.—That is all.

Redirect Examination.

Mr. THATCHER.—(Q.) Why did you use the words 43,000 tons, Mr. Taylor?

(Testimony of David Taylor.)

A. Because that was all that was necessary to secure the loan.

Q. And that was then, at the then present tungsten market, an adequate security for the loan or the issue which you were then undertaking and putting up to others, is that correct? A. Yes.

Mr. WHEELER.—May I ask? (Q.) You have given your reasons why you did it—

The COURT.—Before he leaves that, I would like to have the witness explain a little more fully what he means by a ton of tungsten ore.

WITNESS.—I may have used the terms inadvisably; you speak of tungsten ore as low grade ore that is mined, that is unsalable, it has to be concentrated to get the best market price, a minimum grade of 65 to 70 per cent tungsten in the form of concentrates; low grade ore is not salable.

The COURT.—(Q.) Of course that is evident; but suppose ore which to-day is salable, the same ore to-morrow is not salable; now the salable ore to-day is ten tons, and to-morrow it is not salable, would you call it ten tons to-morrow? [301—297]

A. I don't think I quite get your Honor's question.

Q. I don't quite understand what you mean by a ton of ore. Is a ton of tungsten ore two thousand pounds, whether it is high grade or low grade?

A. Yes, sir.

The COURT.—That is all.

Mr. THATCHER.—(Q.) Now, Mr. Taylor, right

(Testimony of David Taylor.)

in that connection, your statement is that there were 43,000 tons of ore in your letter to the Crucible Steel Company, what did you give as the value of the ore in the mine; calling your attention to the letter, look at it and see—don't answer till you look? (Hands exhibit to witness.)

A. I didn't give any value of the ore.

Q. Well, what was intended, and what would be understood by saying 43,000 tons of ore?

Mr. COOKE.—I object to that.

Mr. WHEELER.—Objected to as incompetent, irrelevant and immaterial, and hearsay.

The COURT.—I will sustain the objection to that.

Q. You state in here, "An assured minimum of 43,000 tons of ore, part of which is developed on three sides and part on two sides. This is equivalent to 860 tons of 70% concentrates, or 60,200 units WO₃." Using the figures which are in that letter, can you tell me whether an expert, or one familiar with tungsten such as the Crucible Steel Company, or anyone else familiar with it, could figure what the value of the 43,000 tons was?

Mr. WHEELER.—Objected to as incompetent, irrelevant and immaterial, the letter speaks for itself.

The COURT.—I will let him answer the question.

A. The Crucible Steel Company would take the value of the concentrates at what they considered the value, according to different prices, whatever

(Testimony of David Taylor.)

they thought it would possibly be worth at different [302—298] times; that price would be based on so much per unit WO_3 in the concentrates; they would calculate from that the value of a ton of concentrates.

The COURT.—(Q.) What is a unit?

A. A unit is twenty pounds is the equivalent of one per cent; when we speak of a unit of tungsten we mean one per cent, one per cent of a ton of tungsten.

Mr. THATCHER.—(Q.) When you say one per cent of tungsten, it is one per cent of WO_3 ?

A. Twenty pounds of WO_3 .

Q. When you say in that letter 43,000 tons would contain 60,200 units of WO_3 , can you translate that back and tell me what the value per ton of tungsten in a ton of ore would be, upon that basis.

Mr. WHEELER.—The witness made no representation in his letter upon that point.

The COURT.—I don't think that is material. In using the terms I thought I would like to know what they mean.

Mr. THATCHER.—(Q.) If 43,000 tons of tungsten will produce 60,200 units what percentage of tungsten does a ton of ore contain.

A. 1.4 per cent.

Q. 1.4 per cent? A. Yes.

Q. Does that mean recoverable tungsten?

A. Yes.

Q. What is 1.4 per cent recoverable tungsten

(Testimony of David Taylor.)

translated into mine tungsten, when you say a basis of 80 per cent recoverable? A. 1.75 per cent.

Q. Could any man familiar with the tungsten market by reading that paragraph ascertain that that 43,000 tons in that mine ran 1.75 per cent tungsten?

Mr. WHEELER.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—I don't think it is material. [303—299]

Recross-examination.

Mr. WHEELER.—(Q.) I am not much interested in the figures just given; some I am very much interested in. “The result is now an assured minimum of 43,000 tons of ore”; by that you intended to say that the result was an assured minimum of 43,000 tons of tungsten ore in that mine, of 2,000 pounds each, didn't you? A. Yes, sir.

Q. And you meant tons, and you didn't mean its value; you meant tons of ore? A. Yes, sir.

Q. Irrespective of its value? A. Yes, sir.

Q. And when you have talked here about a representation to you of 60,000 tons of ore, you meant 60,000 tons of 2,000 pounds each, didn't you?

A. Yes, sir.

Q. Now Mr. Thane, you say, figured 41,000 tons, at least he supplied the figures; on April 17th in the letter that you addressed to the Crucible Steel Company, as I understand you, you yourself figured or caused to be figured in your office, 43,000 tons of ore, is that right? A. Yes, sir.

(Testimony of David Taylor.)

Q. If you figured it yourself what data did you use? A. I used the tungsten market.

Q. No, I am talking about the tons of ore in that mine, not about any tungsten market. 43,000 tons of 2,000 pounds each; where did you get the data on which you got that result? A. April 17th?

Q. Yes.

A. It was stated and represented that the mine contained over 60,000 tons on April 2d.

Q. Yes; and that was all. You used no figures, didn't make any computations, is that right?

A. Used the figures in connection with what?

Q. In arriving at the conclusion that there was 43,000 tons.

A. No, no figures were used. [304—300]

Q. None whatever? A. No.

Q. Then why is it possible that you gave it to some one else to figure out the number of tons of 2,000 pounds each, and got the result 43,000?

A. I didn't say that.

Q. Then the statement that there is forty-three—let me quote it exactly: "The result is now an as-sured minimum of 43,000 tons of ore," is your own statement, and not the statement of any employee whom you directed to figure for you; is that true?

A. Yes.

Q. You stated a while ago that your reason for making that statement was, as I understood you, and also the statement contained in the prospectus, was that you wanted to be sure that if anybody in-tending to go in on the proposition caused the mine

(Testimony of David Taylor.)

to be examined later, there would be no question but that he would find 43,000 tons there. Is that the substance of what you testified to, I don't want to misapprehend you? A. I don't think it is.

Q. Then why put it at 43,000 tons, if I misapprehend you, I do not wish to.

A. My calculations at that time, that 43,000 tons was all the ore that it was necessary to have in any tungsten mine, subject to the costs it would take to get it out, to protect a loan of one hundred and fifty or one hundred and sixty thousand.

Q. Why not put down the sixty thousand tons?

A. I wanted to be conservative, and in case any examination was made by any buyers, we much preferred them to be agreeably surprised when they saw the mine, instead of checking up another way, and disappointed; and 43,000 tons was all that was necessary to secure the loan.

Q. So it was for that reason and not because you thought there was an assured minimum of 43,000 tons that you made that statement?

A. The statement was made for both reasons.

Q. In other words, you didn't want anybody who went out there to find there was less than 43,000 tons, and you thought they might [305—301] find less than 60,000 tons, didn't you?

A. I didn't think they might, I didn't think one thing or another; I didn't want them to find any less.

Q. In other words, you thought it was necessary to put that down to 43,000 because you were not

(Testimony of David Taylor.)

sure they would find 60,000; is not that true?

A. It is not.

Q. You were perfectly sure, without a shadow of doubt in your mind, that they would find 60,000 tons?

A. I was sure there was 60,000 tons there, as Mr. Poole had so stated.

Q. And so without one mental reservation you were prepared to assure people that there were only 43,000 tons there, though you were trying to induce them to go into the proposition, is that the fact?

Mr. THATCHER.—I object; that is not in evidence; the letter shows an assured minimum of 43,000 tons; counsel said not more than 43,000 tons.

Mr. WHEELER.—I don't think there was that difference in the question; if there was I will recast it.

Q. When you wrote this letter dated the 17th of April, you had not conversed with Mr. Thane, had you? A. No, sir.

Q. You had not had your conversation on the train that you have testified to here as having taken place with Mr. Thane? A. No, sir.

Q. You wrote this letter with the hope and expectation of presenting a proposition so good that the people would come in and subscribe to this undertaking, didn't you? A. Yes, sir.

Q. That was your very object in doing it; if you had absolute, complete and perfect faith that there was 60,000 tons of ore there, why did you not say 60,000 tons instead of 43,000?

(Testimony of David Taylor.)

A. Because 43,000 was all that was necessary to secure the amount [306—302] of money I was asking them to put up.

Q. You were trying to induce these people to come in, and make your proposition as attractive as possible, weren't you? A. Yes.

Q. If you were trying to do that, why did you not make it more attractive by saying 60,000 tons instead of say 43,000 tons?

A. I said at least 43,000 tons, and I thought that was attractive.

Q. You don't think 60,000 tons would be more attractive than 43,000 tons?

A. Naturally it would be.

Q. And yet you didn't put down 60,000 tons, although you had not the slightest doubt or question but that 60,000 tons were there?

A. That is correct.

Q. Why didn't you make it as attractive as you could?

A. I thought I was making it attractive enough as it was.

Mr. WHEELER.—That is all.

Mr. COOKE.—Just one question. (Q.) How did the price of tungsten April 17, 1919, compare with the price of tungsten April 2d, 1919?

A. I can't remember offhand; I should say it was probably about the same.

Mr. THATCHER.—Can you find out; have you any memoranda here?

A. No; there is no definite price of tungsten; it

(Testimony of David Taylor.)

is a question of get what you can at the time.

Mr. COOKE.—(Q.) It fluctuates, up and down?

A. Yes.

Q. Would the price go down during that time, rather than up?

A. That is the general tendency; I don't think it commenced to go down really till later; I think it was about stationary February, March and April.

Q. How much do you think it was a unit during the month of April, between April 1st and April 17th?

A. I think I sold some concentrates belonging to this company for about nine dollars and a quarter a unit along in that time.

Mr. COOKE.—That is all.

Mr. THATCHER.—Call Mr. Jackson.

[307—303]

Mr. COOKE.—I would like to ask the Court and counsel to introduce a witness who is here, and has come specially from San Francisco. I do not like to interrupt the order of your proof; it will be short.

Mr. THATCHER.—That is all right; we will be glad to accommodate you, Mr. Cooke.

Testimony of Edson F. Adams, for Defendants.

Mr. EDSON F. ADAMS, called as a witness on behalf of defendants, after being sworn, testified as follows:

Direct Examination by Mr. COOKE.

Q. State your name, please?

(Testimony of Edson F. Adams.)

A. Edson F. Adams.

Q. And your residence?

A. San Francisco, California.

Q. Are you acquainted with the Nevada Humboldt Tungsten Mines Company? A. Yes.

Q. During the year 1919, and in the month of June, 1919, did you have any unsettled business relations with that company?

A. Yes; the Nevada Valleys Power Company, of which I was President, had.

Q. Did you have anything yourself, personally?

A. Not personally.

Q. But it was the Nevada Valleys Power Company? A. The Nevada Valleys Power Company.

Q. And that was some claim for power furnished by your Company to the Nevada Humboldt Tungsten Mines Company? A. Yes.

Q. Can you state approximately how much the claim was?

A. Between five and six thousand dollars; that is, the claim we had against them and the Products Company.

Q. Do you know anything about a meeting of creditors, or a number of creditors of the Nevada Humboldt Tungsten Mines Company, that [308—304] was held on or about June 7th, 1919?

A. Yes, I was present.

Q. You were present. Where was that meeting held?

A. In Frieberg & Eels' office, in the Hobart Building, San Francisco.

(Testimony of Edson F. Adams.)

Q. Have I the date correct as you recall it, June 7th? A. June 7th.

Q. Do you know about how many creditors there were represented at that meeting?

A. No, I do not, but there must have been fifteen or twenty at least.

Q. Do you recall approximately the amount of the debts that they represented?

Mr. THATCHER.—I object to that as incompetent. This witness can hardly be competent to testify as to how much.

Mr. COOKE.—The discussion that was had there in the presence of Mr. Taylor, or his representative.

The COURT.—Well, if he knows how much the debts amounted to, he may say.

WITNESS.—I understood you asked how many of the creditors were present—how much was present?

Mr. COOKE.—No, the question now is approximately how much was represented there in the way of indebtedness?

Mr. THATCHER.—If you know.

A. I do not know positively; the major portion was there.

Mr. THATCHER.—(Q.) Do you know that?

A. Yes, I think that I do.

Q. Do you know how much the Tungsten Company owed at that time?

A. They owed—

Q. (Intg.) Do you know?

(Testimony of Edson F. Adams.)

A. I know from the statement that I saw there at the time. [309—305]

Q. Yes, but the question is, do you know how much the Nevada Humboldt Tungsten Mines Company owed at that time; do you know of your own knowledge, Mr. Adams?

A. All I know is from the figures that I saw there.

Mr. THATCHER.—Object to it on the ground it is hearsay.

The COURT.—If it is material proof of the point, I think you had better prove it in the regular way.

Mr. COOKE.—It is not specially material, your Honor.

Q. Did you meet Mr. Poole and Mr. Murrish and Mr. Nenzel at that meeting? A. Yes.

Q. Did you see Mr. Taylor, the plaintiff in this case, at that meeting? A. Yes.

Q. Do you know Mr. Jackson, one of the attorneys, in this case?

A. I met him there at that meeting.

Q. Did you also meet a lawyer in San Francisco named Bayless, was he there? A. He was.

Q. Do you recall the circumstances of some proposition that had been made by Mr. Taylor to the Nevada Humboldt Tungsten Mines Company, and to its creditors, being presented to that meeting?

A. Yes, there was a proposition that was made there, which was read.

Mr. THATCHER.—Move to strike the answer

(Testimony of Edson F. Adams.)

on the ground it is not responsive. The question is do you remember.

WITNESS.—Yes, I do remember.

Mr. COOKE.—(Q.) You recall that there was a proposition made; was that proposition in writing?

A. It was.

Q. And who read this proposition that you referred to? A. I do not remember.

Q. Do you recall that it was read or submitted to the meeting in any form?

A. Yes, it was in the form of a contract submitted [310—306] to the meeting.

Q. Go on and tell us what you remember about the submission of the form of contract?

The COURT.—Let him tell what occurred at the meeting.

WITNESS.—What occurred at the meeting, or the reading of the contract?

Mr. COOKE.—Yes, sir.

A. You mean what occurred at the meeting?

Q. Yes, sir, what was said and what was done with regard to this contract?

A. Well, there was Mr. Murrish first, and then Mr. Poole made a statement with regard to the mines; and there was also some questions, quite a number of questions asked in regard to the financial report, and then it was proposed that this contract, a proposed contract should be read, and it was finally decided it should be read to the creditors. Some one started to read this contract, and got pretty well along in it, when I got up and said that

(Testimony of Edson F. Adams.)

I didn't wish to hear any more of the contract read, and also opposed the adoption of any such arrangement; I mean the creditors endorsing any such contract as read; it had not been completed, but I heard all I wished to hear of it.

Q. Did you state to any of those present your reasons for not caring to hear any more of it read?

Mr. THATCHER.—I object to his reasons as immaterial.

The COURT.—What is the materiality of this testimony?

Mr. COOKE.—The plaintiff in this case claims that he presented a contract to the defendant and to its creditors, that in equity ought to be accepted, and we want to show that the creditors absolutely refused to accept it.

The COURT.—That testimony is in already, isn't it? They have already proven that the creditors refused to accept that contract.

Mr. COOKE.—I think the circumstances of the refusal would be [311—307] important for the Court to know.

(By direction the reporter reads the question.)

The COURT.—You may answer that yes or no.

A. Yes, I stated briefly.

Mr. COOKE.—(Q.) What did you state?

Mr. THATCHER.—Object to it as incompetent, irrelevant and immaterial.

The COURT.—Well, I will let him put it in.

A. I do not remember exactly my language. Of course I opposed the acceptance of the contract.

(Testimony of Edson F. Adams.)

Q. Give us your best recollection as to what you stated to the meeting as your reasons.

Mr. THATCHER.—I object to that as incompetent, irrelevant and immaterial; that is just his mental attitude.

The COURT.—What is the purpose of getting the reasons out?

Mr. COOKE.—It is a part of the showing of the defendants in reference to a transaction to which Mr. Bayless testified, where he undertook to show that the defendants promised Mr. Taylor that they would urge the creditors to accept this, and Mr. Bayless further stated that they didn't urge the creditors to accept the contract, implying they had violated their promise to Mr. Taylor; we want to show what took place there.

The COURT.—Is this testimony to contradict anything that Mr. Bayless testified to?

Mr. COOKE.—Not specifically; I don't think it would be in this particular part here.

The COURT.—It seems to me you are loading up the record.

Mr. COOKE.—Very well. I think that is all.

Mr. THATCHER.—That is all.

(By agreement of counsel Mr. Adams is excused from further attendance in court.) [312—308]

The COURT.—Do you propose to put on any further evidence with regard to what happened at that meeting, Mr. Thatcher?

Mr. THATCHER.—Well, I haven't any further evidence.

(Testimony of Edson F. Adams.)

The COURT.—Before Mr. Adams goes I would like to find out about that. If there are to me any further facts developed by you with reference to what occurred at that meeting, I would like to know now what they are.

Mr. THATCHER.—They will be no different from the testimony of Mr. Bayless, nor will they be as much.

The COURT.—I don't want to shut this testimony out simply because it seems to be irrelevant at the present time.

Mr. THATCHER.—My objection went particularly to the proposition he was asked why he objected to it, and what reasons he stated for objecting to it. What he did makes no difference; what attitude Edson Adams took in the meeting is immaterial; the question is what the defendants did.

The COURT.—You may put that testimony in if you wish, Mr. Cooke; it will simply be in the record to be used or excluded later as I see fit.

Mr. COOKE.—I think we have covered all we want to cover. [313—309]

Testimony of John G. Jackson, for Plaintiff.

Mr. JOHN G. JACKSON, called as a witness on behalf of plaintiff, testified as follows:

Mr. WHEELER.—Mr. Jackson being a member of the Bar, I will waive the oath.

Direct Examination by Mr. THATCHER.

Q. What is your name? A. John G. Jackson.

Q. Where do you live? A. New York City.

(Testimony of John G. Jackson.)

Q. What is your business or profession?

A. I am a lawyer.

Q. How long have you practiced in New York?

A. Since the 20th day of July, 1903.

Q. Have you been in the active practice of your profession during all of that time?

A. I have, sir.

Q. Do you know Mr. David Taylor? A. I do.

Q. Did you meet Mr. Taylor in New York in the month of April or May, 1919?

A. It was in May, as I recollect I met Mr. Taylor the early part of May.

Q. Did he come in to consult with you professionally? A. He did.

Q. Will you state what matter he presented to you, and the terms of the contract between yourself and Mr. Taylor?

A. Mr. Taylor told me that he was interested in the properties of the Nevada Humboldt Tungsten Mines Company in Nevada, and that he had a contract or contracts, which he then showed me, covering the terms of his interest. He at that time showed me the contracts which are marked as Exhibits "A," "B" and "C," annexed to the pleadings, and I went over them with him, talked to him about them, and in a general way discussed what he was doing to fulfill his undertaking.

Q. Did he employ you to take any part with reference to those contracts? [314—310]

A. He did. We had a preliminary discussion

(Testimony of John G. Jackson.)

directly after our first conference as to whether or not I would come out to Nevada and participate in the reorganization of the existing company, or in the organization of a new company, as might seem best, and look into the titles and the other usual matters connected with such issues of stock.

Q. Were you also to go into the question of the issuance of any additional or different stock?

A. Yes.

Q. And to look after such issues?

A. To look after the issues, yes; generally to see that the whole situation was in order from the point of view of a New York business man or investor.

Q. At that time did you make any contract or have any understanding with Mr. Taylor as to your compensation for this service?

A. Mr. Taylor agreed to pay my firm a fee of five thousand dollars, and expenses for the trip.

Mr. COOKE.—Will you fix the time?

Mr. THATCHER.—(Q.) Can you say when that took place?

A. The agreement with regard to the fee?

Q. I mean when Mr. Taylor first consulted you with reference to the situation?

A. I should think it was around the 5th or 6th of May, somewhere about that time.

Q. Mr. Jackson, were you in your office on the day that Mr. Thane sent a telegram to Mr. Bancroft, asking him to make the examination?

(Testimony of John G. Jackson.)

A. I was. That telegram of May 14th was dictated in my office, which then was at 30 Pine Street, New York.

Q. Had you been consulted with reference to this situation and the Nevada Humboldt Tungsten Mines Company, and Mr. Taylor's contracts with reference to it, prior to that time? A. I had.

Q. And was your arrangement with Mr. Taylor made prior to that time? [315—311]

A. It was tentatively made prior to that time, and subject to Mr. Thane's approval; he approved it at that time, on the 14th day of May, in my office, and said that he would like to have Mr. Bayless also assist Mr. Taylor in this examination, and do some preliminary work; so that on that day telegrams were sent both to Mr. Bayless and to Mr. Bancroft.

Q. Did you come on afterward, pursuant to that understanding, to Nevada? A. I did.

Q. How much of your fee has been paid to your firm in that matter?

A. Twenty-five hundred dollars.

Q. What is your understanding with reference to the situation as it now stands?

A. Well, my understanding is that we forgave Mr. Taylor the balance of the fee in view of the unfortunate outcome of the affair; I have no intention of asking for any more.

Q. You do not claim Mr. Taylor is indebted to you for anything more than the amount which has been paid?

(Testimony of John G. Jackson.)

A. I do not, we are fully paid.

Q. Mr. Jackson, you then came on from New York to Lovelock? A. I did.

Q. Can you tell me for what purpose, and how you came to come on here?

A. My plan when I left New York was to go directly to San Francisco, and there to take up with Mr. Bayless the work he had done, on the understanding that all of the corporate records and papers of all necessary sort would be in San Francisco at that time. En route I received a telegram from Mr. Taylor to stop at Lovelock and go into matters there, so I did, and I arrived there on Thursday, May 29th, if my recollection is correct as to the date, Thursday morning.

Q. Did you see Mr. Taylor there?

A. Mr. Taylor arrived the following Saturday morning. [316—312]

Q. And when Mr. Taylor arrived did you see any of the defendants?

A. I did; I met Mr. Nenzel, Mr. Murrish and Mr. Jones at the office of the company; Mr. Poole did not arrive there until Saturday morning.

Q. What did you do while you were there before Mr. Taylor arrived?

A. I examined the charters, minute books and other corporate records, such as contracts; I discussed at very considerable length certain features of the situation with Mr. Murrish; I checked the corporate activities and corporate history of the

(Testimony of John G. Jackson.)

three companies with the requirements of the law of Nevada, and also discussed certain questions which then presented themselves to me, with Mr. Murrish at length; we had a number of conversations with regard to the legal aspects of the situation. I also ascertained the organization of the company, its officers and directors, and one or two other questions were taken up also, such as a survey.

Mr. COOKE.—What date was this?

A. This was on Thursday and Friday, the 29th and 30th of May. I did not discuss at very great length the proposed reorganization of the present company; we did discuss it somewhat, but I did not commit myself to a plan, because my recollection is by the time I was ready to discuss that I had received a telegram from Mr. Taylor, which indicated that he did not want me to take that up until he arrived and talked to me; he gave me no reason for that request.

Mr. THATCHER.—(Q.) Mr. Jackson, when Mr. Taylor arrived, did you and Mr. Taylor take any trip with any of the defendants, or go to any place?

A. We did.

Q. Where did you go?

A. On Saturday we took the train from Lovelock to—I think the name of the station was Mill City; in any event, we took the train to the nearest station to the mine, and went from there by automobile to the mine. [317—313]

(Testimony of John G. Jackson.)

Q. And who went on that trip, yourself, Mr. Taylor, and who else? A. And Mr. Poole.

Q. And you went up to the mine?

A. We did, all three of us went to the mine.

Q. When you got to the mine—was there any conversation took place with reference to the mine at first on the way up, do you recollect?

A. Yes. When Mr. Taylor arrived at Lovelock he informed Mr. Poole that Mr. Bancroft had reported that the mine contained something less than 20,000 tons of commercial ore, and he was very much astonished and upset, because he had understood—I believe Mr. Poole had told him—that there were certainly over 60,000 tons of commercial ore, and he could not understand it; Mr. Poole said he could not understand it, and so—

Mr. WHEELER.—The conversation between these parties is objected to as far as the defendant Loring is concerned; it is incompetent, irrelevant and immaterial as to him.

Mr. COOKE.—It is also objected to by all the other defendants, except the defendant Poole, as not binding upon them.

The COURT.—I will follow the same rulings heretofore made.

Mr. THATCHER.—If the Court please, the defendant Poole held the power of attorney for some of the stockholders; if these things were communicated to him, they were communicated to those for whom he was acting.

(Testimony of John G. Jackson.)

The COURT.—Well, it will be considered then, as far as those powers of attorney will admit, as against the defendants who gave the powers of attorney.

Mr. WHEELER.—I had no opportunity to object to the question; it slipped into the evidence as to the conversation with Poole before I could know what it was; for that reason I ask that it be limited so far as it has already gone. [318—314]

The COURT.—It is so ordered.

Mr. THATCHER.—Do you know where you left off, Mr. Jackson?

A. I think perhaps I had better start over again. The conversation in Lovelock, when Mr. Poole, Mr. Taylor and myself met, the discussion as I recollect was on the sidewalk; we walked up and down for quite a while, discussing the situation. Mr. Taylor said first to Mr. Poole that Mr. Bancroft had reported something less than 20,000 tons of commercial ore in the mine; Mr. Taylor was very much upset, because he had started for New York some time ago prepared to close the deal, and Mr. Bancroft's report had come along, and he was extremely disappointed.

Mr. COOKE.—That is what he said?

A. This is what Mr. Taylor said. Mr. Poole said he, too, was very much surprised; I can't say exactly his words, don't pretend to, but the substance of it was that he could hardly believe it. We then agreed the best thing to do was to go up to the

(Testimony of John G. Jackson.)

mine and see what was the best thing to be done. We took the train and went up to the mine; on the railroad this conversation was discussed with some detail as to various parts of the mine; I am not sufficiently familiar with mining to have that impressed on my mind at all.

Mr. THATCHER.—(Q.) After you got to the mine, did you go down the mine? A. I did.

Q. Who went with you?

A. Mr. Poole and Mr. Morrin, the superintendent, took me down in the mine.

Q. Did you go through various workings in the mine?

A. I understand I was taken through the whole mine.

Q. You understand that how? A. Mr. Poole.

Q. What did they do while they were down the mine, while you were with them?

A. Shall I describe?

Q. Describe it as near as you can. [319—315]

A. In various places they chipped off some of the surface rocks, dirt, and so on, put it in a pan and put water in the pan; and swished it around until there was a certain residue left; I believe the operation is called panning.

Q. Did they take many pannings while they were down in the mine?

A. They took quite a good many; we were down in the mine I should say between two and three hours—it seemed longer than that to me.

(Testimony of John G. Jackson.)

Q. After you came up did you meet Mr. Taylor?

A. I did.

Q. Was Mr. Taylor with you?

A. Mr. Taylor was with me.

Q. Where did you meet Mr. Taylor?

A. We met either in or just outside of the mine possibly; we immediately went into the mine office.

Q. What took place then, and what was said.

A. Mr. Taylor came up and said, "Well, what about it"? Mr. Poole said, "Bancroft is right, the foreman lied to me."

Q. Then what happened, Mr. Jackson?

A. My recollection is that shortly after that we took the train back to Lovelock—had dinner on the train.

Q. After you got back to Lovelock did you see any of the defendants at that time, when you got back to Lovelock?

A. We got back to Lovelock late in the evening, and we met Mr. Goodin at a hotel. I think it is the Big Meadows Hotel, and had a conversation with him; the situation was stated to him just as Mr. Taylor had told it to Mr. Poole with regard to representations made in April that there was 60,000 tons of ore, that Bancroft now reported only 20,000 tons of commercial ore; that Mr. Taylor had proceeded to raise this money on the understanding that this was in effect a banking proposition, and the value of the ore disclosed would secure the money advanced; that under the circum-

(Testimony of John G. Jackson.)

stances as they now existed, according to Mr. Bancroft's report, Mr. Taylor could not put his money in that [320—316] business in any other way than on the basis on which it had been raised.

Q. That was to Mr. Goodin?

A. That was to Mr. Goodin. Mr. Goodin used some rather strong language, and he seemed considerably upset, too; as I recollect, he said something to the effect that he had been more or less fooled, too.

Q. On the mine? A. On the mine.

Q. Now after that what happened, Mr. Jackson; where was Mr. Poole at this time?

A. Mr. Poole had gone off to his home, I think to get his bag, or something of that kind, or to see Mr. Nenzel and Mr. Murrish; we all planned to go to San Francisco that night.

Q. You were all planning to go to San Francisco that night? A. Yes.

Q. Was that a new or an old arrangement?

A. That arrangement had been made in the morning in Lovelock before we went to the mine.

Q. Do you know what the purpose of going to San Francisco was?

A. Mr. Taylor and I wanted to go there, because we felt that it would be possible with the co-operation of creditors to make a deal on substantially the same lines of the April 2d contract, with the advances pro-rated to the condition of the mine as disclosed by Mr. Bancroft; that was the reason

(Testimony of John G. Jackson.)

we wanted to get to San Francisco; there was nothing more we could do in Lovelock, and it seemed to us that San Francisco was a better place to negotiate.

Q. Was there any agreement or understanding between Mr. Taylor or yourself, or any of the defendants, about going down there; as to whether or not that was the place where the contract was to be closed up, or where the papers were, or anything of that kind, if you recollect? [321—317]

Mr. WHEELER.—I understand your Honor's ruling to be this is all confined to the defendants named, and not to these unnamed or unaffected by the powers of attorney?

The COURT.—That will be understood all through the case, unless there is a different order made; that is, as to conversation.

Mr. THATCHER.—As to conversation, for instance, if the conversation is later brought home, or the actual facts are in turn brought home to any other of the defendants, I think it might become binding upon them; it will all depend on the chaining up of the various conversations.

The COURT.—Well, I will leave it just as it was before I made the last statement.

WITNESS.—If I understand your question, Mr. Thatcher, we had not represented or told any of the defendants who were present, that is, in Lovelock, that we were going down at that time, on that Saturday, to pay over the money in the full

(Testimony of John G. Jackson.)

extent; Mr. Poole had been told the situation, and he had been told that of course under such conditions, as they were then, Mr. Taylor could not pay over the full \$150,000.

Mr. THATCHER.—(Q.) Do you know whether or not at Lovelock Mr. Poole was informed as to any other proposition that you would make?

A. That was discussed on the way back from the mine, to Lovelock, the proposition of advancing money to the company, which would pay a substantial dividend to the creditors, and which would be secured by the amount of ore actually blocked out; I am not sure whether on the train the exact amount was discussed or not; but I think it was, and I think the amount then mentioned was \$75,000.

Q. From there you went on to San Francisco?

A. Yes.

Q. Did you meet the defendants at any time down there? [322—318]

A. We did.

Q. State when and where, the persons present, and what took place.

A. We reached San Francisco Sunday afternoon; our first conference was the following day, Monday; that was June 2d, I think; the meeting was at the office of Mr. William S. Bayless, in the Crocker Building, and those present at this first conference were Mr. Taylor, Mr. Bayless, Mr. Poole, Mr. Nenzel, Mr. Jones and Mr. Murrish. At that conference I acted as the spokesman for Mr. Tay-

(Testimony of John G. Jackson.)

lor, and when we were all in Mr. Bayless' office I said that in view of the developments in connection with the mine it seemed to me in order to state the full history of the case and the full facts of the situation, in order to see if some fair deal could not be reached; and in order to be sure that we were proceeding on common ground, I wanted to state to the gentlemen who were representing the mine and the stockholders what my understanding of the facts was; and I said that I would like to be corrected if I went wrong at any time in their judgment during the course of my statement. With that preliminary, I went back, as I recollect now, to the January contracts; I said that Mr. Taylor had then made two contracts, one with the stockholders and one with the company; the contract with the company provided for the advance of money against concentrates for the purpose of more or less financing the company at a time when the tungsten market was bad, and permitting them to gradually liquidate some debts, and develop the property; that as a part consideration for this contract the stockholders had given to Mr. Taylor an option to buy the mine for \$500,000.

Q. You say an option to buy the mine, you mean the stock?

A. The stock of the mine, yes; it was not all the stock, it was so much a share, which in the aggregate would fix the value of the stock at \$500,000; there were a few shares these gentlemen didn't pretend to [323—319] control; following the

(Testimony of John G. Jackson.)

making of these contracts Mr. Taylor had found it impossible to interest people in the purchase of this stock at that price, and accordingly they had met in his office in Denver. There, after considerable negotiation, a new contract, dated April 2d, had been entered into; prior to executing that contract, and as a reason for entering into it, Mr. Poole had represented to Mr. Taylor that the mine contained 60,000 tons of commercial ore; it now developed that that representation was a mistake; Mr. Bancroft had just examined the mine, and reported that there were but 20,000 tons of commercial ore in the mine; that under those circumstances, while Mr. Taylor had come west from New York with the money to close the deal, and expected to close it, he now could not put into this company's treasury to pay its debts, or for any other purpose, the money which he had in part raised himself, and in part from his friends on one basis, whereas there had now developed an entirely different condition of affairs. I continued to say that, nevertheless, in spite of this situation, Mr. Taylor was very much interested in this mine, and that he would like to work out with them an equitable and fair deal, which would be substantially on the same basis, and even more favorable to the company than the basis set forth in the April contract. I was authorized to offer to the company an advance of \$75,000 to be secured by concentrates, and in addition to that—I am not sure whether it was on the first interview, but certainly was later,

(Testimony of John G. Jackson.)

Mr. Taylor authorized an additional advance of \$10,000, to be used as working capital. I also said that some arrangement would have to be made with the creditors, so that to the extent that this \$75,000 did not pay them all, they would not interfere with Mr. Taylor's security; that he was entitled to work his money out of the ore blocked out, as certified by Mr. Bancroft; and that when an additional 20,000 tons of ore were blocked out he would [324—320] advance the balance of the money to pay off the rest of the creditors. The suggestion I made was that all creditors whose claims were \$500 or less, be paid off in full, and that the remaining creditors be paid pro-rata. It figured a dividend, as I recollect, of about forty-five per cent to all of the other creditors, and excluded Mr. Taylor, who was a secured creditor. On Tuesday I think we had no meeting, the matters were under consideration; and on Wednesday we had one or two meetings; there were various details discussed of one kind or another. I recollect that among the matters discussed was the personnel of the board of directors and the officers of the company, and my recollection is now that—

Mr. WHEELER.—Of the old company, or a new company to be organized?

A. Well, I have just come to that, Mr. Wheeler. My recollection is—I am certain as to the fact, but could not swear whether it was Wednesday or Thursday morning, we came to an agreement that a new company was to be organized, and to issue

(Testimony of John G. Jackson.)

preferred stock—not preferred stock, but to issue bonds for the amount of its claims. Mr. Taylor agreed to buy \$85,000 worth of these bonds; \$75,000 was to be applied in payment of claims, and \$10,000 was to remain as working capital; the personnel of the company, of the directors and managers, was agreed upon; my recollection is that Mr. Taylor was to be president, Mr. Thane was to be the engineer or supervisor in charge of operations—consulting engineer; and Mr. Poole was to be in charge of operations at the mine; I think one director was to be agreed upon by the creditors, and the fourth I have forgotten, I don't remember who it was. That, in outline, is the proposition; it was agreed upon and accepted by all concerned, and then the discussion came up as to who should embody this in writing; it was suggested variously Mr. Poole, Mr. Murrish or myself should [325—321] draw the contract, finally it was put up to me, and I said I would, with the understanding that what I prepared would be a tentative draft, subject to revision; it seems to me we were all agreed on the substance of the proposal, and the nature of Mr. Taylor's security, and I would prepare a draft on that understanding; and from that point of view; I went back to my room at the hotel, wrote it out in long hand then gave it to the hotel stenographer, who wrote it out, and it was put, I think two copies, certainly one copy and I think two copies, in the mail box, of the representatives of the Nevada company or the stockholders of the Nevada Humboldt

(Testimony of John G. Jackson.)

company. According to appointment previously made, we met in Mr. Bayless' office at seven-thirty on Friday night to discuss this contract, and make any revisions that seemed advisable; those present at that time were Mr. Poole and Mr. Nenzel; Mr. Murrish and Mr. Jones were not present. Mr. Poole said that Mr. Murrish did not care to make any changes in the contract, that it was satisfactory; that they would submit it to the creditors at a meeting which they called for to-morrow, and would recommend and urge its acceptance. That was as satisfactory as we could hope or expect from any point of view, and the meeting then adjourned. Following it the creditors' meeting was held; Mr. Taylor and I were not permitted to attend until the very end of the meeting; it was just before lunch time when we went over to the meeting at the office of some engineers, Freitag & Ainsworth, I think it was, and we found it was impossible to do anything with the gentlemen present for several reasons; in the first place—I am not permitted to say the reasons, I suppose. I think that about concludes.

Mr. THATCHER.—(Q.) Do you recollect anything I have forgotten to ask you, Mr. Jackson? That covers generally your connection with the situation? [326—322]

Mr. WHEELER.—Objected to as calling for the opinion and conclusion of the witness.

Mr. THATCHER.—That is all; you may cross-examine.

(Testimony of John G. Jackson.)

WITNESS.—I would like to add one statement, if I may, to my recollection of the interview of June 2d, Monday; that is, during the course of the conversation as I made statements, or concluded a statement of fact in regard to the history of this matter, I would ask the gentlemen from time to time whether that was correct; I would say, “Is that correct”? And at no time during that meeting was a statement contradicted; and in several instances Mr. Poole acquiesced by nodding his head or saying, “Yes, that is so.” That is particularly true, I would like to say, with regard to the representation as to the quantity of ore, commercial ore, in the mine, because I had that especially in my mind when I made the statement to see whether it was admitted or whether it was not admitted; I have a very distinct recollection of it.

Cross-examination.

Mr. WHEELER.—(Q.) In other words, you were trying to get an admission right there, weren't you; that was your scheme and plan?

A. My plan was to see if they were together on the facts, and if the facts were correct as I stated them, to have them admit them.

Q. It was your plan to try to get by silence or acquiescence an admission that that charge was true, wasn't it? A. I have stated my plan.

Q. I ask you to state it again in response to my question. A. My plan was—

Q. Read the question.

(The reporter reads the question.)

(Testimony of John G. Jackson.)

A. An admission of what, Mr. Wheeler?

Q. I dislike to go back to the context, was it not your plan, and [327—323] did you not deliberately frame your statement with the idea of getting from those men there present, either affirmatively or by silent acquiescence, an admission that the charge of false representations was true? A. I did.

Q. So you had planned that before the meeting, and had blocked out in your own mind just what you were going to say on that point, hadn't you?

A. Yes, sir.

Q. At that time you had had some discussion of a suit for damages as being possible, hadn't you?

A. None whatsoever.

Q. In New York when you were first employed, can you name the exact day? A. No, I cannot.

Q. Can you name the exact day upon which it was agreed that your firm should receive \$5,000?

A. No, sir, excepting that it was prior to the 14th day of May, and it was confirmed on that day in our conference with Mr. Thane.

Q. As I understood you, it had been made subject to Mr. Thane's agreement?

A. Yes, Mr. Taylor said he expected to have Mr. Thane interested in the mine, or have something to do with the management of it when the deal was closed, as they expected then to close it at the end of that month, so he would like Mr. Thane to approve; also Mr. Thane, he said, had been negotiating with some people in New York, who would probably take preferred stock after it had been

(Testimony of John G. Jackson.)

issued, and so he wanted to find out whether in view of that possible sale of stock, it would be acceptable to Mr. Thane to have us pass on the matter, or whether Mr. Thane would rather have some other New York firm.

Q. At any rate, you didn't consider the matter closed until the 14th, when you got Mr. Thane's approval?

A. You mean definitely committed?

Q. Yes. A. No, I won't say so. [328—324]

Q. So the agreement to pay your firm \$5,000 was concluded coincidentally with the arrangement to telegraph Mr. Bancroft?

A. I think that is correct, sir.

Mr. WHEELER.—In behalf of the defendant Loring, your Honor, it now being apparent that these expenses in the shape of counsel fees were incurred after the determination had been reached to have an independent investigation, we ask that the evidence to that effect be stricken from the record.

Mr. COOKE.—I wish to join in the same motion.

(Argument.)

The COURT.—I do not feel quite so clear about this matter as counsel does, and while I think the testimony is very weak as to Mr. Taylor's absolute reliance in the statements that were made after he met Mr. Thane on the train, still he has testified that he did rely on those statements, and I can imagine how at that time he wanted to interest Mr. Thane in this matter, that he was absolutely

(Testimony of John G. Jackson.)

compelled to yield to him, and to agree to have a further investigation made; and he would have been an unwise man if he had made up his mind so fully at that time that he would not change it later, if there were an adverse report by Mr. Bancroft. But I do not feel at this time like striking that testimony out; still I think the argument has a great deal of force; it is a matter that ought to be considered, and probably will be considered; it is something that has been in my mind all day, or ever since that line of questioning was taken up by Mr. Wheeler.

(An adjournment is taken at 4:35 P. M. until Monday, September 20th, 1920, at 10 o'clock A. M.)
[329—325]

Monday, September 20th, 1920.

Court convened, 10 o'clock A. M.

Mr. JOHN G. JACKSON on the witness-stand.

Mr. WHEELER.—I understood your Honor had formally ruled on that matter at the last hearing?

The COURT.—Yes, I have thought about that somewhat since the recess, and I am inclined to adhere to the ruling made.

Mr. WHEELER.—We of course reserve our exception. No further questions, Mr. Jackson.

Mr. THATCHER.—I think there are no further questions, but I would like to reserve the right to ask any questions necessary, if the Court please.

Testimony of David Taylor, for Plaintiff (Recalled).

Mr. DAVID TAYLOR, the plaintiff, recalled for further direct examination.

Mr. THATCHER.—(Q.) Mr. Taylor, you testified while in New York you sold certain securities for the purpose of having money available for this deal. Have you a memorandum, or can you tell us the dates when these securities were sold?

A. I have a memoranda.

Q. Where is it? A. It is in that file.

Q. Did you prepare this memoranda yourself?

A. I did.

Q. What from? A. From my own books.

Q. Is this the one. (Showing paper to witness.)

A. Yes.

Q. What securities did you sell, Mr. Taylor; state the dates, character of the securities, whether bonds or stocks?

Mr. WHEELER.—Objected to as incompetent, irrelevant and immaterial. [330—326]

Mr. THATCHER.—For the purpose of showing reliance upon the representations of the defendants in this case.

Mr. WHEELER.—Whether stocks or bonds don't tend to show any reliance.

The COURT.—I will overrule the objection.

WITNESS.—Shall I read a list of these?

Mr. WHEELER.—The witness is testifying from a memoranda made by him when?

(Testimony of David Taylor.)

Mr. THATCHER.—(Q.) When did you make the memoranda, Mr. Taylor?

A. The memorandum was made up yesterday—Saturday.

Q. Show it to counsel. (The memorandum is handed to counsel for defendants.)

Mr. WHEELER.—We object to the use of the memoranda as incompetent, irrelevant and immaterial, self-serving and hearsay.

The COURT.—I think the objection is good.

Mr. THATCHER.—To the use of it? I have not offered it in evidence, if the Court please.

Mr. WHEELER.—Well, I object to its use, being a recent memoranda made by the witness yesterday, he says.

The COURT.—I suppose he wishes to testify as to the stocks and securities that he disposed of.

Mr. THATCHER.—Yes, sir. It would merely mean using the memoranda to refresh his memory.

The COURT.—Well, a memoranda made at about the time that the transaction occurred would be proper for that purpose, but this was made only yesterday.

Mr. THATCHER.—(Q.) Have you your books here, Mr. Taylor? A. Yes, sir.

Q. Using your books, will you state what stocks were sold at that time?

Mr. COOKE.—We object to that time; if he is going to testify [331—327] from his books, we submit they ought to be before us.

Mr. THATCHER.—Wait until I finish the question.

(Testimony of David Taylor.)

Q. Have you your books here?

A. I have my ledger here.

Q. When were the items entered in the ledger?

A. They were entered in the ledger from the cash book some time after this transaction; I don't know just when they were written up, probably within two or three weeks.

Q. Who wrote them up? A. I did.

Q. Did you keep your own cash-book and your own ledger? A. I do.

Q. And have you the ledger here at the present time? A. I have.

Q. Does the ledger contain a true and accurate statement as to the sales of your securities, the amounts received therefor, and the dates when sold?

A. It does with a variation of one or two days on the dates.

Q. Why do you say with a variation of one or two days on the dates?

A. My cash-book shows the dates that the deposits of money received from the sale of stock were deposited, while the stocks may have been sold by the brokers a couple of days before and all paid at the same time; I have a telegram from the broker showing the days.

Q. Never mind the telegram; don't you know as a matter of fact they were entered in the cash-book or in the ledger? A. Yes.

Q. And before the dates which appear thereon; the dates as shown in your ledger are the dates when

(Testimony of David Taylor.)

the money was received from the sale of the stock, is that correct? A. Yes.

Q. Is this your ledger? (Hands to witness.)

A. Yes, sir.

Q. Will you turn to the page or pages from which you took the memoranda or the date which you have here, and state the number of the pages on which they occur in your ledger? [332—328]

A. On pages 2, 3, 4, 5, 7, 10, 42, 43.

Q. Using the ledger which you have will you state what dates you sold and what stocks you sold, and the amount and character of the stocks?

A. On May 16th sold five Union Pacific first mortgage bonds.

Mr. WHEELER.—One moment. We object to any evidence whatever as to any sales of any stocks or bonds made at any time after the 14th day of May, 1919, upon the ground that it appears from the evidence that any sales, or anything that was done by this witness certainly after the 14th day of May, we say earlier than that, but at any rate after the 14th day of May, was done by him after he had reached a determination to have an independent investigation of the property made before investing any funds of his own therein. Secondly, that it is not enough that it should appear that he sold some stocks or bonds, but it must appear that he suffered a personal detriment, and that detriment would not appear from the mere circumstance that he bought at one price and sold at a loss; but it would have to appear that if he had held on to the stocks and

(Testimony of David Taylor.)

bonds that he would not have suffered a loss, and that he would have held on to them but for the use that he intended to make of them.

Mr. THATCHER.—We take the position, if the Court please, that this evidence shows performance, or getting ready to perform, and that it also shows reliance upon the representations, that he did sell the stocks, that he did suffer a loss, that is, over the price which he paid for them, and we will show what that loss was. And it is our further contention that the mere fact that he may have determined to make a further investigation, or an investigation through or by an expert before finally putting his money into the loan, rather than the performance of the services, is entirely [333—329] immaterial, and that the rule of law is that a person may partially rely upon the representations, and he may partially rely upon other considerations, and when he does so it is not necessary to show that the representations were the sole inducement which caused him to act; all that is necessary is to show that they were a material or an actual inducement for him in acting or endeavoring to perform the services.

The COURT.—Well, I will admit the testimony, but I am not passing on that question as to the proof of the loss. I would like to hear from you further as to whether the proper method of proving the loss is to show the purchase price of these bonds or stocks, and the price at which he sold them; it might have been very profitable for him to have sold them at that time.

(Testimony of David Taylor.)

Mr. THATCHER.—Yes, that is true. I think we can show what the facts were, as far as that is concerned; I am not sure as to that.

Mr. WHEELER.—Permit me to say, your Honor, in response to counsel's suggestion, we do not accept his statement at all in regard to the rule of law.

(Discussion.)

Mr. WHEELER.—It seems to me we can hasten matters a little. Why not put in this memorandum?

Mr. THATCHER.—I am perfectly willing.

Mr. WHEELER.—I think the Court and counsel understand my suggestion is merely to save time; it does not admit the materiality of the evidence.

Mr. COOKE.—Has the Court disposed of the objection as to the contents of that, the purchase price and the selling price?

The COURT.—No, the purchase price I am very dubious about. As I said before, the fact that he may have bought some of this [334—330] stock for a thousand dollars and sold it for nine hundred dollars does not indicate there was any loss; subsequent facts may show it was a very profitable thing for him to do.

Mr. THATCHER.—I have prepared two exhibits, your Honor, one which shows the loss and one which does not.

The COURT.—I will make simply a *pro forma* admitting that or rejecting it, as you wish; it is in the record.

(Testimony of David Taylor.)

Mr. WHEELER.—The difficulty is, it does not show the stock quotations upon the date on which the transactions here concerned took place. The date of the filing of the complaint, for instance, it does not appear what was the condition of the stock market on that day, and on that day would he have suffered a loss or made a profit. There is nothing to indicate that on the statement.

Mr. THATCHER.—I will offer both exhibits.

Mr. WHEELER.—If that is to go in in this way, in order to save time, will you consent that the quotations as they appeared in the San Francisco or New York papers upon the respective dates since that time, right down to date, may also be looked to.

Mr. THATCHER.—Yes, we will consent that any financial paper in good standing may be used as evidence to show the quotations of the sale price or value of any stock listed here.

Mr. WHEELER.—That being consented to we will not insist upon the witness going into his books in order to make the offer that is now proposed; but we are not to be understood as admitting its materiality, relevancy or competency; we present our objection to the statement offered, and to the statement offered supplemented by the quotations counsel has consented may come in; even so, we say it is incompetent, irrelevant and immaterial.

Mr. COOKE.—There is no limitation as to time?

Mr. THATCHER.—No. [335—331]

Mr. WHEELER.—It runs right down to date.

(Testimony of David Taylor.)

Mr. THATCHER.—They may all be admitted, subject to their materiality, but not as to the foundation necessary. I withdraw the offer of both, and offer just one, which has everything the other has.

(The paper offered is marked Plaintiff's Exhibit No. 40.)

Mr. THATCHER.—(Q.) Mr. Taylor, I call your attention to a check, and ask you if you ever saw that before?

A. I did.

Q. Whose check is it? A. F. M. Taylor's.

Q. Is that the check which you referred to the other day upon your direct and cross-examination, of \$25,000 given to you by F. M. Taylor?

A. It is.

Mr. THATCHER.—We offer it in evidence, if the Court please.

Mr. WHEELER.—Objected to upon the ground it is incompetent, irrelevant and immaterial, it appearing that it was a payment made to the witness on the 28th day of May, 1919, long after he had determined upon an independent investigation, and long after he had news from his expert, Mr. Bancroft, as to what the independent investigation had resulted in.

The COURT.—The same ruling as in the others.

Mr. THATCHER.—I offer this upon the additional ground of showing exactly what the transaction was, considerable examination as to the date having taken place.

(Testimony of David Taylor.)

(Check for \$25,000 to the order of David Taylor is marked Plaintiff's Exhibit No. 41.)

Mr. THATCHER.—(Q.) Mr. Taylor, I call your attention to what purports to be a copy of a telegram addressed to Wells Fargo Nevada National Bank, of date May 27th, and ask you if you sent that to the Wells Fargo Bank at San Francisco?

A. I did.

Q. Did you receive a reply from that?

A. I did. [336—332]

Q. I call your attention to a telegram purporting to be signed by the Wells Fargo Bank, on a letter-head of the Postal Telegraph Company, and ask if you received that telegram in reply to yours of the 27th? A. I did.

Mr. THATCHER.—We offer them both in evidence as one exhibit.

Mr. WHEELER.—We make the objection that the evidence is irrelevant, immaterial and incompetent, and specifically, that the telegrams seem to have passed between the Wells Fargo Nevada National Bank and the witness on the 27th and 28th days of May, a time long subsequent to the time on which he had determined to have an independent investigation of these properties made, and after he had received the report from his engineer, Mr. Bancroft, who had made the investigation, and at a time when he was acting upon information received from Mr. Bancroft, and not on anything received from the defendants, or any or either of them.

(Testimony of David Taylor.)

Mr. THATCHER.—These telegrams are prior to the receipt of the Bancroft report.

Mr. WHEELER.—Mr. Bancroft's wire had come earlier.

Mr. THATCHER.—Mr. Bancroft's wire also came on the 27th; he had not received any assays. Mr. Bancroft's wire was that the tonnage was sufficient, but he could not definitely say until he received the assays.

The COURT.—I am rather doubtful about these, Mr. Thatcher, but I will allow them in.

Mr. THATCHER.—I offer it for the purpose of showing continued reliance up to that date on the representations made—preparation for completion of all the terms of the contract.

(Telegrams dated May 27th, and May 28th, 1919, sent to and received from Wells Fargo Nevada National Bank by David Taylor, are marked Plaintiff's Exhibit No. 42.) [337—333]

Mr. THATCHER.—We offer this in evidence as one exhibit.

Mr. WHEELER.—Object to it as irrelevant and immaterial. You need not further identify it; we agree they were sent and received respectively. Objected to as irrelevant, immaterial and incompetent, particularly that of date May 12th, the date when the letter of the witness was written; it appears to have been at a time after the witness had determined to have an independent investigation made by Mr. Bancroft, before proceeding with the transaction.

(Testimony of David Taylor.)

Mr. THATCHER.—I might state what the letters are. One is a letter to the New York Trust Company by Mr. Taylor, asking whether he can arrange to borrow \$40,000 on security; that was on May 12th; and the answer, on May 15th, to Mr. Taylor, saying that they will lend him \$40,000 for ninety days upon the security just mentioned in his letter, being scheelite concentrates.

Mr. WHEELER.—Our precise point is, after a man has determined to have independent investigation made, he may well go ahead making preparations so he will know what he can do in the event that he is satisfied; yet it is indicated there that he would not need it, if he needs it at all, for about fifteen days, showing that he was contemplating obtaining an independent report before proceeding and would not tend to show he was in any way relying upon representations made, but was merely making his preparations in anticipation of the report of his own expert.

Mr. THATCHER.—We offer it for the purpose of showing continued reliance on the representations which were made.

The COURT.—It will be admitted.

(Letter from David Taylor to New York Trust Co., dated May 12th, 1919, and letter from New York Trust Company to David Taylor, dated May 15, 1919, are marked as one exhibit, Plaintiff's No. 43.)

Mr. THATCHER.—I call your attention to—
[338—334]

(Testimony of David Taylor.)

Mr. WHEELER.—We admit the fact it is a letter written by L. A. Friedman and received by the witness, and we object to it as irrelevant, immaterial and incompetent, and that if admitted for any purpose it must be confined to Mr. Friedman, but as to him we urge the objection.

Mr. COOKE.—Did you state any purpose in that offer?

Mr. THATCHER.—No; I want to show the representations of Mr. Friedman.

Mr. COOKE.—After the contract was made.

Mr. THATCHER.—It is on April 17th, after the contract was made, but it is a continued representation, a continuation of the various representations theretofore made.

Mr. COOKE.—After counsel's statement we object on the ground it is not responsive to any issue in the pleading; that it is after the contract was entered into, therefore could not induce him to make any contract, and in any event, the representations in the letter are not representations of any fact upon which the plaintiff could have placed any reliance whatsoever.

Mr. WHEELER.—Mr. Friedman says, your Honor, in that letter of April 17th, that the mine was looking bigger and better all the time; there is no issue in the case touching any representations alleged to have been made after April 17th, and certainly the representation made at that time is not responsive to any issue presented, and for

(Testimony of David Taylor.)

that reason, it seems to me it is entirely irrelevant and immaterial.

The COURT.—I don't see how you can claim that the contract was made in reliance upon that letter. The fact that the mine was looking bigger and better every day might be absolutely true, and still your case be good or bad.

Mr. THATCHER.—Your Honor is perfectly correct, on that, but [339—335] there is a line of authorities holding that in false representation cases, having shown those which were relied upon, you may show others of like character, and even show that they were made to other persons. A decision by Judge Hook of the Circuit Court of Appeals so holds.

The COURT.—I will allow that testimony to go in, but it will go out if you don't convince me that that is correct law, because my opinion is against you on that point.

Mr. THATCHER.—If I don't convince your Honor, it may go out.

(Letter dated April 17, 1919, to David Taylor from L. A. Friedman is marked Plaintiff's Exhibit No. 44.)

Mr. THATCHER.—You may cross-examine.

Cross-examination.

Mr. WHEELER.—(Q.) On page 7 of your sworn complaint, among other things you say, that the defendants Poole, Murrish and Nenzel with the intent to deceive the plaintiff, represented to the

(Testimony of David Taylor.)

plaintiff that on the 2d day of April there was blocked out, in sight and ready for mining and reduction into concentrates over 60,000 tons of scheelite ore. On what day did they represent to you, or did any or either of them represent or say to you, that over 60,000 tons of scheelite ore was in sight and ready for mining and reduction into concentrates?

Mr. THATCHER.—Objected to as not cross-examination, and as already having been testified to.

The COURT.—I will allow the question. It is not strictly cross-examination, but there has been not continuous cross-examination or direct examination, either.

A. It was the Monday following their arrival in Denver, whether the exact words that you have read there are the words used—the statement was [340—336] that ore was developed and blocked out; now whether in sight was included, I could not tell you.

Mr. WHEELER.—(Q.) Did not testify heretofore on your cross-examination that you could not say whether they used the words blocked out, or the word developed?

A. I don't know, sir; I have not seen a copy of my record on cross-examination.

Q. If you did say that the word that was used might not have been blocked out, or in substance so state, was it true or false?

A. What was that, please?

(Testimony of David Taylor.)

(The reporter reads the question.)

A. I don't understand your question.

Q. I will reframe it. If on your cross-examination you have said that you could not recall whether or not the word that was used was blocked out, was your statement on cross-examination true or false?

A. Will you give me that once more, sir.

Mr. THATCHER.—I think, if the Court please, that that is not a proper question, or form of question to ask a witness.

Mr. WHEELER.—I think counsel is right, your Honor.

Q. Did they use the exact words "blocked out"?

A. Whether it was blocked out or developed—I am not sure whether it was blocked out or developed.

Q. Why when you filed this complaint did you make the sworn allegation that they said that it was in sight?

Mr. THATCHER.—Object on the ground this witness did not swear to this complaint.

Mr. WHEELER.—I submit it is entirely proper.

Mr. COOKE.—He swore to it, and subsequently filed an affidavit.

Mr. THATCHER.—I verified this complaint; he filed an affidavit subsequently. [341—337]

Mr. WHEELER.—(Q.) There is on file here an affidavit that the statements contained in this complaint are true; I *will* your attention to that, Mr. Witness.

(Testimony of David Taylor.)

The COURT.—He may answer the question.

Mr. WHEELER.—(Q.) Why did you make an affidavit that they said that the ore was in sight?

Mr. THATCHER.—I object to the question on the ground if it is for the purpose of impeachment, of having made another or different declaration, or sworn to one, the witness is entitled to have the exact words.

Mr. WHEELER.—I am giving the exact words.

Mr. THATCHER.—Your statement was that he had sworn to the complaint.

Mr. COOKE.—He swore to an affidavit, stating that the allegations of the complaint were known to be true.

Mr. WHEELER.—I will put it in this form: (Q.) Why did you say in an affidavit that the statement in your complaint that the representation to you was that there was in sight over 60,000 tons of ore?

A. I don't see the difference, and I don't know the difference now between in sight, developed or blocked out, which words were used.

Q. You do not now know which words were used, one or the other was used?

A. I said that "in sight" was not, I don't remember "in sight." I said to your question just now I didn't know what the difference would be from a technical standpoint of ore in sight developed or ore blocked out.

Q. So when you stated in your affidavit that they

(Testimony of David Taylor.)

had represented to you the ore was in sight, you really didn't mean to say they had made that representation? A. No, sir.

Q. Or that they had used those words?

[342—338]

A. They used the words in sight, blocked out, or developed, some of them, I don't see the difference.

Q. I understand you don't see the difference, but I am trying to get from you which words were used, whether you see the difference or not.

A. Blocked out or developed, I don't remember the words in sight having been used, they may have been.

Q. Why did you say in your affidavit that they said that that ore was in sight, if they didn't use that phrase?

A. It seems to me the term in sight is equivalent to blocked out or developed.

Q. At any rate, you understood when you made your affidavit, and you now understand, that those words were the equivalent, each of the other, is that right? A. Yes.

Q. Nothing has occurred which has led you to believe that there is a difference between the words in sight, developed and blocked out?

A. I don't know whether there is from an engineering standpoint or not; there is nothing from my standpoint; I could not answer which was which.

Q. As a matter of fact, you didn't take them to mean anything more or different, as you under-

(Testimony of David Taylor.)

stood the phrases, than that there was that quantity of ore in sight? A. No.

Mr. WHEELER.—That is all.

Mr. THATCHER.—That is all.

Mr. COOKE.—(Q.) This \$25,000 check, Mr. Taylor, you have testified regarding, that you received from your father; was there any other business transaction of any kind embraced in that check, aside from this subscription? A. No, sir.

Q. By that you mean that the entire \$25,000 was to be wholly devoted to this subscription arrangement to which you have heretofore testified?

A. Yes, sir.

Mr. THATCHER.—Is that all?

Mr. COOKE.—Yes. [343—339]

Mr. THATCHER.—Will counsel admit the making and execution of the Loring contract, the contract between the corporations and Mr. Loring, a copy of which is attached to your answers?

Mr. COOKE.—We do.

Mr. WHEELER.—Well, we set forth in our answer that the contract was made, and set it forth as an exhibit; it does not call for any further admission.

Mr. COOKE.—Counsel can have it as far as we are concerned.

Mr. DAVIS.—There is a clerical error in the copy of the mortgage attached.

Mr. WHEELER.—While counsel are looking for that I would like to call the Court's attention to the fact that the contract with Mr. Loring is a

(Testimony of David Taylor.)

contract for the purchase of properties of the several corporations, not for the purchase of stock; and that it appears therefrom that Mr. Loring obligated himself to pay \$333,333.33 for these properties. It also appears that the times of payment were such that by this time there must have been paid a sum in excess of \$258,000 on account; and also that at the time this suit was brought there had already been paid \$233,000 and upwards, on account; also that the first payment under that contract, as called for, was, as I remember it now, the first day of September, 1919. That is a matter of consequence upon the question of laches in instituting this suit, coming in at a late period, not until the defendant had changed his position materially, and paid a very large sum into the corporation, after the plaintiff must have known that contract was outstanding, and that by its terms it would be forfeited unless Mr. Loring made the payments.

Mr. DAVIS.—The clerical error to which I wish to call the Court's attention, so it may be corrected, is on page 3 of Exhibit 5 of defendant Loring's answer: The statements of the items of [344—340] the mortgage; The first four of \$50,000 each; the next, on line 28, should be \$33,333, and the next four \$25,000 each.

Mr. THATCHER.—I will ask Mr. Taylor one more question.

The COURT.—Is that to be admitted?

Mr. THATCHER.—The correction?

(Testimony of David Taylor.)

The COURT.—Yes.

Mr. THATCHER.—Why, I presume so, if the Court please.

The COURT.—It conforms to the documents attached to the statement presented on the first hearing, Mr. Loring's affidavit?

Mr. WHEELER.—That the document as now amended does conform?

The COURT.—Yes.

Mr. WHEELER.—Yes; I think it was a clerical error in making copies. What did counsel wish. These agreements are set forth in our answer, and it seems to me he requires no admission as to that.

Mr. THATCHER.—They are part of your separate defense, and unless some admission is made in regard to them, I think it would be necessary to have some proof. All I want is to have it admitted that the copies which are there may become a part of the record, as showing the transactions between the company and Mr. Loring.

Mr. WHEELER.—We admit the documents to be genuine and duly executed. I don't know what Mr. Cooke wishes.

Mr. COOKE.—We have pleaded it, and I am certainly willing to admit it.

Mr. THATCHER.—(Q.) Mr. Taylor, I call your attention to an envelope and to a letter and notice in the inside of it; did you receive that in due course of mail? A. I did.

(Testimony of David Taylor.)

Q. Was the notice in the envelope? A. Yes.

Mr. THATCHER.—This is the notice of the meeting of the stockholders, and the envelope which went with it. [345—341]

Mr. WHEELER.—Objected to as irrevelant, immaterial and incompetent, particularly as to the defendant Loring.

Mr. THATCHER.—We offer it, if the Court please, upon the ground that it shows the notice given of the meeting of the stockholders of the Nevada Humboldt Tungsten Mines Company, and the date when mailed and given to stockholders; and we will hereafter show to your Honor that a contract made with Mr. Loring was made at those meetings, and that it was made after giving only seven days' notice of a stockholders' meeting, which does not comply with the statute of Nevada relative to the sale of all of the assets of a corporation.

The COURT.—Has he answered with reference to this, to show that this notice was given?

Mr. THATCHER.—I don't know what their answer on that is. Mr. Taylor has, he said that he received it. I am going to put another witness on the stand just a moment. I am through with Mr. Taylor unless you want to ask some questions.

The COURT.—It may go in, showing that is the notice that Mr. Taylor received.

(The envelope, with notice dated Lovelock, Nevada, August 16, 1919, is marked Plaintiff's Exhibit No. 45.) [346—342]

Testimony of Rudolph Nenzel, for Plaintiff.

Mr. RUDOLPH NENZEL, one of the defendants, called as a witness by plaintiff, after being sworn, testified as follows:

Direct Examination by Mr. THATCHER.

Q. I show you Plaintiff's Exhibit 45, Mr. Nenzel, an envelope and paper, and ask you if you ever saw those before? A. Yes, sir.

Q. Are those the notices that were sent out of a meeting of the Nevada Humboldt Tungsten Mines Company? A. Yes, sir.

Q. Were they sent out on the day on which that notice is dated? A. I believe so.

Q. Take a look at the envelope; did you ever see the envelope before? A. Yes, sir.

Q. Do you notice the postmark as to when it was mailed? A. Yes.

Q. Does that assist you in ascertaining when it was mailed? A. No, sir, it does not.

Q. They were not sent out before that, were they?

A. I have an affidavit as to when that was mailed, which would refresh my recollection.

Mr. THATCHER.—I move to strike out the last part of the answer of the witness on the ground it is not responsive. I asked him if that refreshed his memory, and he said no.

The COURT.—It may go out.

Mr. THATCHER.—(Q.) I call your attention to

(Testimony of Rudolph Nenzel.)

some papers, and ask you if you ever saw those before? A. Yes, sir.

Q. Calling your attention to page one, I ask you what that is? A. Waiver of notice.

Q. Is that a copy?

A. That is a copy, yes, sir.

Q. Are those copies of proceedings of the Nevada Humboldt Tungsten [347—343] Mines Company meetings of the corporation, and its stockholders and directors? A. Yes, sir.

Q. Look through all of the pages and tell us what it is for sure.

A. That is the minutes of the special meeting of the board of directors of the Nevada Humboldt Tungsten Mines Company, held at Lovelock, Nevada, August 16th, 1919.

Q. Will you number the pages there?

Mr. WHEELER.—What is that?

Mr. THATCHER.—This is a copy which was furnished to me by Mr. French; that is how I got it; he handed it to me after the meeting was held.

Mr. WHEELER.—We might check it up against the books.

Mr. THATCHER.—Suppose you check it up against the books, and we will offer it in evidence; that is all I want to prove.

Mr. WHEELER.—Subject to our right to check them up and be satisfied they are correct, and if incorrect, and with the consent of the Court, to change it so it will be correct.

The COURT.—Subject to your reservation to check it up the paper will be admitted.

(Minutes of special meeting of the Board of Directors of the Nevada Humboldt Tungsten Mines Company is marked Plaintiff's Exhibit No. 46.)

(A short recess is taken at this time.)

Mr. THATCHER.—If the Court please, I am through, except I want to offer those exhibits which were marked for identification. They are Exhibits 4 and 7, and there were a number of letters connecting Mr. Poole as engineer of the corporation, or acting in that capacity, and being so recognized by the defendants; they were offered and marked for identification.

Mr. WHEELER.—We made our objection at that time, if not, we [348—344] object as irrelevant, immaterial and incompetent, not shown to have been authorized by any person concerned, and not tending to prove the issues to which counsel says they are addressed; that some of them are obviously self-serving, and that under no circumstances would they be evidence save as against the persons writing them, and in any event they must be confined to such persons.

The COURT.—Those letters were written by various defendants?

Mr. THATCHER.—Yes.

Mr. COOKE.—Can you refer to the particular letters for identification?

Mr. THATCHER.—*Plaintiff's for identification*

36; I will withdraw that. Now these letters are already marked, and I will withdraw two of these; those to Mr. Pettigrew, signed by Mr. Murrish and signed by Mr. Nenzel, and I will offer in evidence a letter of January 19th, from Mr. Friedman to Mr. Taylor, in which he says: "Mr. Bancroft is at the mine and has called up here at the office regarding some work, as Mr. Poole has unavoidably been delayed on account of the litigation at Rochester, and he talked the matter over with Mr. Bancroft by 'phone and he will be at the mine to-morrow, but Mr. Bancroft had expected him there to-day, but unfortunately it will be impossible for him to arrive there until to-morrow and I am sure that they will outline such a course of development work as will be entirely satisfactory to all parties concerned, and I sincerely hope that the mine will turn out even bigger than we expected and that you will make a profit on your deal which will be far beyond your most sanguine expectations." One of the purposes in offering the letter is to show the connection of Mr. Poole with the mine as an engineer, and that it was recognized by Mr. Friedman as one of the defendants.

Mr. WHEELER.—Objected to as irrelevant, immaterial and incompetent, [349—345] not tending to prove any issue in the case.

The COURT.—That was more than two months and a half before the contract was entered into?

Mr. THATCHER.—That is true, if the Court please, but where there are a series of statements

and representations, all reasonably connected, following along within a reasonable period, I take it that they may all be used, and that they are not too remote to be a part of the case.

Mr. COOKE.—We submit it does not show anything affirmatively or definitely, any connection with the property that counsel speaks of.

(Discussion.)

The COURT.—I will sustain the objection.

Mr. THATCHER.—I would like to have it marked the next number in order, showing it was rejected, and I will take an exception.

(Letter dated January 19th, 1919, from L. A. Friedman to Captain David Taylor, is marked Plaintiff's Exhibit No. 47, rejected.)

Mr. THATCHER.—If the Court please, the second letter, which is a part of Exhibit 35 for identification, is for the same purpose; the date is April 9th; "Mr. Poole left for Tungsten to-day and probably will be there for a day or two and when he returns he no doubt will write you fully regarding conditions." That is signed by Mr. Nenzel.

Mr. COOKE.—We make the same objections to that as was made to the one from Mr. Friedman to Mr. Taylor, dated January 19th, in respect to its not being proof that the defendant Poole did have any peculiar knowledge of the matters and things set up in the complaint. It does not show that he had any such connection with the property as would afford him any such knowledge; does not show that he had any connection with the property at all; except he is going out there and stay for a day or

two, and no doubt will write [350—346] Mr. Taylor fully regarding conditions. That is Mr. Nenzel's statement; and I don't see how they can prove Poole was engineer of the property, or that he had any knowledge of it by such very general statements as that.

Mr. THATCHER.—Well, it merely shows that they relied upon Mr. Poole when it came to a question of the mine, and the mine conditions.

The COURT.—Well, I will let it go in, Mr. Thatcher.

(Letter dated April 9th, 1919, from R. Nenzel to Captain David Taylor, marked Plaintiff's Exhibit No. 35, for identification, is admitted and marked Plaintiff's Exhibit No. 35.)

Mr. THATCHER.—I think that is all, if the Court please. We rest. [351—347]

In the District Court of the United States, in and
for the District of Nevada.

Honorable E. S. FARRINGTON, Judge.

B-7.

DAVID TAYLOR,

Plaintiff,

vs.

NEVADA HUMBOLDT TUNGSTEN MINES
COMPANY, a Corporation, et al.,
Defendants.

Statement of the Evidence.

VOLUME 2.

APPEARANCES:

Mr. GEORGE B. THATCHER, for Plaintiff.

Mr. H. R. COOKE, for Defendants Nevada Humboldt Tungsten Mines Company, et al.

Mr. JOHN. F. DAVIS and Mr. CHARLES R. WHEELER, for Defendant W. J. Loring.

Lodged in clerk's office Feb. 18, 1922. E. O. Patterson, Clerk. By O. E. Benham, Deputy.

Settled and filed June 9, 1922. E. O. Patterson, Clerk.

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Testimony of C. W. Poole, for Defendants.

C. W. POOLE, one of the defendants, called as a witness, after being sworn, testified as follows:

Direct Examination by Mr. WHEELER.

Q. What is your name? A. C. W. Poole.

Q. Where do you reside?

A. Lovelock, Nevada.

Q. What is your occupation? A. Mining.

Q. How long has that been your occupation?

A. Continuously since 1904, with the exception of three months.

Q. Of what institution of learning are you a graduate? A. University of Pennsylvania.

Q. What year? A. 1904.

Q. Graduated in 1904; have you had a professional course, or experience in any other institution of learning? A. No.

Q. What was your occupation throughout the year 1919? A. Mining.

Q. Where? A. With the Rochester Mines.

Q. In Nevada? A. Yes.

Q. What kind of mine is that?

A. Not the entire period of 1919.

Q. I understand. Well then, let us take the month of January, and up to the 2d day of April?

A. I was with the Rochester Mines Company.

Q. What kind of a mine is that?

A. That is a silver and gold mine.

Q. Where is it situated with reference to the location of the properties owned by the Nevada Tungsten Mines Company?

(Testimony of C. W. Poole.)

A. It is some fifty miles south of there by the road, about thirty miles air line.

Q. Do you recall taking a trip to Denver in the latter part of [353—348] March, 1919?

A. Yes.

Q. Who went with you?

A. Mr. Nenzel and Mr. Murrish.

Q. You have been present in the courtroom, I take it, while certain letters were offered in evidence, among them being a letter in which a request by the plaintiff Taylor is made that Mr. Poole, Mr. Murrish and Mr. Nenzel be sent on to Denver, as he could not come out to make an examination of the property as requested by Mr. Friedman, could not come out with Mr. Bancroft to make an examination of the property; do you recall that correspondence?

Mr. THATCHER.—I object to that as not within the evidence shown.

Mr. COOKE.—In what respect?

Mr. WHEELER.—If there is any dispute about that the best evidence would be the record. I think you will not disagree with me Counsel, if I put it this way: That Mr. Friedman on the 27th day of March sent a telegram requesting that Mr. Poole and Mr. Bancroft come out and visit the property, and expressing the hope that they would find the mine up to their expectations; that there is in evidence an answer from Mr. Taylor, saying that he cannot come, that Mr. Bancroft is away, and that he himself is going to be engaged until about the 10th

(Testimony of C. W. Poole.)

of April, and suggesting that the stockholders might send on Mr. Poole, Mr. Murrish and Mr. Nenzel. Those are the matters embraced in my question.

Mr. THATCHER.—I object on the further ground it is leading; I don't want counsel to testify; I prefer that the witness tell the facts.

Mr. WHEELER.—My understanding of counsel's objection was that it was not in accordance with the fact.

Mr. THATCHER.—I made both objections.

(By direction the reporter reads the question.)
[354—349]

Mr. THATCHER.—I object to the question as leading.

The COURT.—I will overrule the objection.

Mr. WHEELER.—(Q.) Answer that, sir?

A. I do.

Q. State whether or not it was in response to Mr. Taylor's request that you, Mr. Murrish and Mr. Nenzel went on to Denver in the latter part of March, 1919? A. Yes.

Q. After arriving in Denver, did you see the plaintiff Taylor? A. I did.

Q. On what date?

A. The first time I saw him was a few hours after our arrival on Sunday, probably an hour after we arrived.

Q. Sunday what date?

A. March 30th, as I recall.

Q. Sunday, March the 30th; did you or not see him again on Monday, March 31st?

(Testimony of C. W. Poole.)

A. I did see him.

Q. I hand you Plaintiff's Exhibit 15, and ask you if a document or one substantially similar was exhibited to you on Sunday, March 30, 1919, by Mr. Taylor; look it over, please, and examine the exhibits thereunto attached, but first confine your answer to the typewritten portion?

A. That seems to be the same report.

Q. That is, the typewritten portion thereof?

A. Yes, sir.

Q. Now please examine the plates thereon, and state whether or not each of those plates appears to be the plate and in the same condition that it was at the time the report was shown to you?

A. Some of the plates have been changed.

Q. I have difficulty in hearing you, and I know they can't hear you further away, so please bear it in mind and be very clear in your answers. What plates are the same, and what, if any, are not the same, as when exhibited to you?

A. Plate one is the same; plate 2 is the same; plate 3 is the same; plate 4 is the same; plate 5 is changed; plate 6 is changed; this appendix 11-A is the same.

Q. You say that plate 5 is changed? In what way does plate 5 [355—350] differ now from its appearance at the time that it was shown to you on Sunday, March 30, 1919.

A. There are certain lead pencil additions to plate 5 that were not there.

Q. Were any of the pencil marks or lines

(Testimony of C. W. Poole.)

now appearing upon plate 5 there on the first occasion that you saw that plate, on Sunday, March 30, 1919? A. No.

Q. Do you know when they were placed there?

A. No.

Q. Do you know by whom they were placed there, as a matter of your knowledge? A. No.

Q. Did you see them placed there? A. No.

Q. Were you present on any occasion when they were placed there? A. No.

Q. Did the plaintiff Taylor on Sunday, March 30, 1919, ask you to plot on plate 5, or on any other plate or plates, recent developments at the mine, or developments since Bancroft's report had been made? A. No.

Q. You spoke of changes in plate 6, what changes have been made in plate 6 since you saw the same on the 30th day of May, 1919?

A. This pencil mark here (indicating).

Q. You are now pointing to certain dotted lines in the lower left-hand corner of the sheet, plate 6?

A. Yes, sir.

Q. Are those the only lines or changes that have been made since that time?

A. Well, this pencil mark here, this dashed one.

Q. You are pointing now to a line in the upper right-hand corner? A. Yes.

Q. Consisting of dashes? A. Yes.

Q. Do you know who made those changes upon that map? A. I do not.

Q. Did you see them made? A. I did not.

(Testimony of C. W. Poole.)

Q. Were you present on any occasion when they were made? A. No.

Q. Do you know positively that this is the precise document shown to you on that date, or are you to be understood as saying that [356—351] this is a duplicate, if not the precise document, of the documents shown on that date?

Mr. THATCHER.—Objected to as leading.

The COURT.—I will allow the question.

WITNESS.—Do I know that is the precise document?

Mr. WHEELER.—(Q.) Yes. A. I do not.

Q. Then apart from the additions of the lines and figures mentioned by you, you are not certain that this is the precise document, but you are certain that it is a duplicate of the document with those exceptions; is that what you intend to be understood as saying?

Mr. THATCHER.—We submit it is leading, if the Court please.

Mr. WHEELER.—There is no question about its being leading.

Q. Well, as a matter of fact, if this is not the original document is it the same, or substantially the same, as the document shown to you, with the exception of the pencil figures and lines?

A. It is.

Q. Were you present in the office of Mr. Taylor in Denver on the morning of Monday, the 31st day of March, 1919? A. I was.

Q. Were Mr. Nenzel and Mr. Murrish present

(Testimony of C. W. Poole.)

throughout the interview with Mr. Taylor on that occasion? A. They were.

Q. Was Mr. Murrish there all of the time, or only a portion of the time?

A. He was there all the time.

Q. Was Mr. Nenzel there all the time, or only a portion of the time?

A. He was there all the time.

Q. On Monday morning, May 31st, did Mr. Taylor in the presence of Mr. Nenzel and Mr. Murrish, or in the presence of either of them, or in your presence alone, ask you if you had put on the original Bancroft report, memoranda showing the additional tonnage of ore with its values, that had been blocked out since Bancroft's report?

A. No. [357—352]

Q. Did he ask you any such question, either in substance or effect, on that occasion?

A. He did not.

Q. Did you on that occasion state to Mr. Taylor that you had not had an opportunity to do that, that is, to put on the original Bancroft report memoranda showing the additional tonnage of ore with its values, that had been blocked out since the Bancroft report was made? A. I did not.

Q. Did Mr. Taylor on that occasion say to you, "Well, let's get the figures down now," and did you thereupon give or state or indicate to Mr. Taylor the lines and the figures, or either of them, giving tonnages and assay values, widths of ore, and did Mr. Taylor put them down on the map at that time?

(Testimony of C. W. Poole.)

A. He did not.

Q. Was any line or figure or memoranda, giving tonnages and assay values, or width of ore, or any other memoranda put down by Mr. Taylor on the map, plate 5, annexed to Exhibit 15, or on any other map, on Monday, the 31st day of March, 1919, in your presence? A. There was not.

Q. Were any lines representing the limits of the or any ore bodies in the property belonging to the defendant Nevada Tungsten Mines Company, together with figures which you claimed of commercial ore as shown by those lines, placed upon any map in your presence by Mr. Taylor on that occasion? A. No.

Q. When is ore said by men in your profession to be blocked out?

Mr. THATCHER.—Is he testifying as a mining engineer? He said mining; I don't believe he has testified that he is qualified. Of course we would merely like to know what his qualifications are.

Mr. WHEELER.—I think I have shown he is a graduate of a well known educational institution of this country.

Mr. THATCHER.—I didn't understand that he graduated from the mining department of that institution. [358—353]

Q. What is the fact?

A. I graduated as a bachelor of science, and majored in metallurgy and geology.

The COURT.—He may answer the question, if he knows.

(Testimony of C. W. Poole.)

WITNESS.—What is the question?

Mr. WHEELER.—The meaning of the phrase blocked out, referring to ore in mines.

A. Ore that has been developed on four sides.

Q. Is ore that is developed on two sides or three sides, and not on four sides, said to be blocked out?

A. No.

Q. Did you on Monday, March 31st, on the occasion referred to in previous questions, say to Mr. Taylor that a certain area in the property of the Nevada Tungsten Mines Company was blocked out, and did he ask you to put it down on the map, and to show where it was? A. No.

Q. Is it true or untrue that all of the pencil memoranda appearing upon plate 5, were placed upon plate 5 annexed to Plaintiff's Exhibit 15, in your presence while you were reading the figures to Mr. Taylor and standing over his chair most of the time while he was putting them down?

Mr. THATCHER.—Objected to as leading, and I further object to the form of the question, asking him whether true or untrue; the witness can state the facts, and testify whether he did or did not.

Mr. WHEELER.—I have no objection to recasting the question if counsel desires me to.

Q. Were all of the pencil lines, all of the pencil memoranda, or any or either of such lines or memoranda that appear upon plate 5, annexed to Plaintiff's Exhibit 15, placed by Mr. Taylor there in your presence?

A. No, they were not placed there in my presence.

(Testimony of C. W. Poole.)

Q. Did you on that occasion read to Mr. Taylor the figures to put down, or did you stand over his chair most of the time while he was putting them down, telling him the figures?

A. No. [359—354]

Q. Did you stand over his chair and tell him any figure or line to put down upon that plate at any time on Monday, the 31st day of March, 1919?

A. I did not.

Q. Was that paper in its present form made in your presence? A. No.

Q. Was any part of it made in your presence at any time? A. No.

Q. Either on that day or any other day?

A. No.

Q. Did you tell Mr. Taylor either on that day or on any other day that you had not had an opportunity to put the lines and figures upon that plate 5 annexed to Plaintiff's Exhibit 15? A. I did not.

Q. Did you on Monday, March 31st, at any time that any of the figures were placed upon plate 5, annexed to Plaintiff's Exhibit 15, or at any time during that same day, after any notes or figures or lines were placed thereon, either in the presence of Mr. Nenzel and Mr. Murrish, or either of them, state to Mr. Taylor that there was over 60,000 tons of ore developed within the blocks indicated by the lines on plate 5, said Exhibit 15? that is, by the pencil lines shown on the map? A. No.

Q. Did you make any similar statement to him on Monday, March 31, 1919?

(Testimony of C. W. Poole.)

A. Any similar statement?

Q. Yes, on Monday, March 31st, that there were over 60,000 tons of ore developed within the blocks indicated within these lines, by the pencil lines shown on the map? A. No.

Q. Did you on that occasion, any time on that day, either in the presence of those gentlemen, or either of them, or otherwise, on that day say to him that there were over 60,000 tons of ore developed within the blocks indicated by the pencil lines shown on the map, plate 5, annexed to Plaintiff's Exhibit 15, which would average over 1.75 tungstic acid? [360—355] A. I did not.

Q. Did you on that day or date make any similar statement to Mr. Taylor? A. I did not.

Q. Did you on that day and date, in substance or effect, make to him any part or portion of that statement? A. I did not.

Q. Did you say that there was 60,000 tons altogether, including the original amount blocked out, or original amount represented by Mr. Bancroft, or appearing on the map? A. I did not.

Q. Did you on that occasion state to him that these blocks which have the pencil memoranda on, referring to plate 5, Plaintiff's Exhibit 15, and those which are within the pencil lines, had blocked out 60,000 tons? A. I did not.

Q. Did you make any such résumé on that day, after these figures appearing on plate 5, Plaintiff's Exhibit 15, had been put down?

A. You say after the résumé?

(Testimony of C. W. Poole.)

Q. Did you make any such résumé as to the tonnage in the mine? A. No.

Q. After these figures on plate 5, or any other figures, had been put down on this map, or any other map, on Monday, the 31st day of March, 1919?

A. No.

Q. How long had you known Mr. Taylor on Monday, the 31st day of March, 1919?

A. I had met Mr. Taylor for the first time very early in January of the same year.

Q. Where had you seen him?

A. In San Francisco.

Q. For how long a time had you seen him?

A. I saw him off and on for the period of a week at intervals, not off and on for the period of a week.

Q. Was that on the occasion of the discussion of the terms of the proposed option which he subsequently took in January, 1919? A. Yes.

Q. Seeing him off and on during that period, did you see him in [361—356] the presence of other people always, or were you alone together?

A. I don't recall ever having been alone with him.

Q. What was the nature of your relations at that time, strictly business relations, or social and business? A. Strictly business.

Q. How many hours altogether did you see him at that time?

A. I would say ten to twenty hours; I could not recall.

Q. And that was spent in discussing various phases of the proposed option? A. Yes.

(Testimony of C. W. Poole.)

Q. And that was all in January, 1919?

A. Yes.

Q. When next did you see him after January, 1919, in San Francisco?

A. I saw him next in Denver on Sunday, March the 30th.

Q. In the meantime you had personal correspondence with him?

A. I had had occasion to write him once, I think, and wire him once, that was all.

Q. Have you the correspondence that passed between you by wire or otherwise during that period?

A. I think so, yes.

Q. At the noon hour I will ask you to produce it for my inspection, please. A. Yes.

Q. Then apart from one or two letters referred to and the telegrams passing between you, you had had no other relations with him prior to March 30, 1919, than those you have already testified to?

A. None whatever.

(At 12 o'clock a recess is taken until 1:30 P. M.)

AFTER RECESS—1:30 P. M.

Direct Examination of C. W. POOLE resumed.

Mr. WHEELER.—(Q.) Mr. Poole, before recess you mentioned the letter or telegram which had passed between you and Mr. Taylor intermediate to your first acquaintance with him in January, 1919, and the 30th day of March, 1919; examine the letter which I present [362—357] to you, also the

(Testimony of C. W. Poole.)

telegram, and state whether or not they are the documents referred to by you, or rather copies of them. A. They are.

Mr. WHEELER.—We offer them in evidence for the purpose of showing the relation of the parties.

Mr. THATCHER.—No objection to the telegram.

Mr. WHEELER.—The telegram is offered and becomes our Exhibit “W.”

(Telegram from C. W. Poole to David Taylor, dated January 21, 1919, is marked Defendants’ Exhibit “W.”)

Mr. THATCHER.—I have no objection to this letter, being a copy of one which I offered in evidence, to which counsel objected.

(Letter from C. W. Poole to David Taylor, dated January 24, 1919, is marked Defendants’ Exhibit “X.”)

(Defendants’ Exhibits “W” and “X” are read by counsel.)

Mr. WHEELER.—I will say to your Honor the purpose of showing this fully, the relations of the parties, is to rebut any suggestions contained in the evidence that confidential relations existed as between the witness and Mr. Taylor.

Q. Were there any other letters or telegrams that you can now recall that passed between you and Mr. Taylor at any time subsequent to your meeting in January, and this meeting in Denver on the 30th day of March, 1919?

A. None that I recall; I think there are none.

Q. Did you at any time say to Mr. Taylor that the

(Testimony of C. W. Poole.)

figures upon the map, plate 5, being a part of Plaintiff's Exhibit 15, represented the state of the tonnage of commercial ore represented within the lines upon the map? A. I did not.

Q. Did you state to him on that occasion, or ever, that the figures 42728 appearing upon plate 5, so often referred to in your examination, [363—358] represented the tonnage of commercial ore existing between the lines drawn on that map from the bottom of a shaft to a point on level number 2, or any other part or portion of that map?

A. I don't believe I understand that question.

(The reporter reads the question.)

A. I did not.

Q. Did you ever make to him any representation or statement at any time that there were 42728 tons of ore represented upon the map, plate 5?

A. No.

Q. Did you say at any time that the ore within the angle formed by the pencil lines drawn from the pencil lines indicating the bottom of the shaft, was an area in which there was 60,000 tons of ore?

A. No.

Q. Or 42,728 tons of ore? A. No.

Q. Did you state or represent to Mr. Taylor on that occasion, or ever, that there were 9250 tons in the block in the extreme southwestern corner of the map, being plate 5? A. No.

Q. Or in block "M" upon said plat? A. No.

Q. Did you say to him or state or represent to him on that occasion, or ever, that in block "N"

(Testimony of C. W. Poole.)

appearing upon that plat there was contained 4200 tons of ore, or any other number of tons? A. No.

Q. Did you ever say to Mr. Taylor in substance or effect, that you knew definitely from the data upon the said plat or plate 5, or upon any map, that there was 60,000 tons of ore, or any other number of tons, in any other portion of the mine?

A. I would like to hear that question again.

(The reporter reads the question.)

A. I did not.

Q. Did you on the 31st day of March, 1919, say to Mr. Taylor that the ore within the area marked "M" upon that plate 5, averaged on the surface outcrop two per cent from any point to any other [364—359] point, or that it averaged three-quarters of a per cent at any place or point?

A. I did not.

Q. Did you calculate on that day or at any other time, or give to him the figures 4200 tons, or any other figures, as representing the quantity of ore included within the limits of the lines appearing upon plate 5? A. I did not.

Mr. THATCHER.—You are referring now to block "N"?

Mr. WHEELER.—To block "M."

Mr. THATCHER.—Well, block "M" is marked 9250; block "N" is 4200; the question was directed toward 4200, and I don't know whether you had it "M" or "N."

Mr. WHEELER.—I had "M," and asked the question in that form because the record reads thus

(Testimony of C. W. Poole.)

at page 86: "And so you understood Mr. Poole as telling you that he knew definitely from the data upon this map that there was that amount of ore in that portion of the mine?"

The COURT.—That is in "M"?

Mr. WHEELER.—In "M."

A. Yes, sir.

Q. And you supposed that it was possible for a man to know definitely with working no greater in extent that there represented on the map?

A. Mr. Poole stated to me that the entire surface outcrop averaged 2 per cent from that point to that point; he stated that that averaged three-quarters of a per cent; he calculated or gave me the figures as being included within those limits." That is the whole thing, and it seems to refer to "M," but in order to catch it both ways I asked my question, if you will look at it, in such form that it covered not only the 4000 odd tons, but also the 9000 tons. Shall I have the question read?

Mr. THATCHER.—No.

Mr. WHEELER.—(Q.) Did you state to Mr. Taylor on that occasion [365—360] on the 31st day of March, or on any other occasion or day, that there was 60,000 tons of ore blocked out or developed in that mine? A. I did not.

Q. Did you say to him on that occasion, or on any occasion, that there was 60,000 tons of ore in sight?

A. I did not.

Q. Did you ever say to Mr. Taylor, positively or otherwise, that there was over 60,000 tons of ore

(Testimony of C. W. Poole.)

developed in the mine which would average 1.75 per cent tungstic acid? A. I did not.

Q. Did you make such a statement, in substance or effect, either positively, or as a matter of opinion? A. I did not.

Q. Neither as an opinion nor otherwise?

A. No.

Q. Did you in substance or effect in talking to Mr. Taylor on that 31st day of March, or on any other day, say "There are 60,000 tons of ore that will average over 1.75 per cent developed in the mine"? A. No.

Q. Did you ever say to him that 60,000 tons of ore, or any other sum, was blocked out?

A. I never did.

Q. Did you say that it was proven in the mine that there were 60,000 tons? A. I did not.

Q. Did you tell him that he could count upon that tonnage as being there definitely? A. I did not.

Q. Did you, pointing to the map, plate 5, as the same now appears, say to him in substance or effect, this block of ore, pointing to the map, is developed on four, this on three sides, and this on two sides?

A. No.

Q. Mr. Poole, you have spoken thus far specifically of a meeting on Sunday, the 30th day of March, of a meeting on Monday, and you have made certain statements generally as to your meetings and conversations with Mr. Taylor; did you meet again on Tuesday, the 1st day of April, 1919? A. I did.

Q. Where did you meet on that occasion?

(Testimony of C. W. Poole.)

A. We met in Howland Bancroft's office in the Symes Building.

Q. Did you meet later on that day at any other place? A. Yes. [366—361]

Q. Now on the day that you met in Mr. Taylor's office, was there any discussion of the tonnage of ore in the mine—this is on Tuesday, April the first? A. There was no discussion.

Q. On Tuesday, April the 1st, was anything done or arrived at in the way of the figures upon which the proposed option or contract was to be made with Mr. Taylor? A. Yes.

Q. In the course of that discussion did you see or hear Mr. Taylor say anything to Mr. Murrish with regard to advantages or disadvantages that would come to Mr. Murrish as a stockholder in the event that proposition made by him should be accepted? A. Yes, I did.

Q. Did you on that day and in connection with that conversation, see him produce or prepare any writing?

A. He produced a couple of sheets of paper, I remember that.

Q. I hand you Defendants' Exhibit "B," and ask you whether or not on that day, Tuesday, the first day of April, 1919, you saw that paper in Mr. Taylor's office? A. Yes.

Q. Did you read or hear the paper read, wholly or in part?

A. I don't think I heard it read wholly; it may have been read in part, I can't be certain of that;

(Testimony of C. W. Poole.)

it was lying on Mr. Taylor's desk, and there for our examination.

Q. Did you on that occasion hear Mr. Taylor say anything to Mr. Murrish with reference to the wisdom of the stockholders accepting the proposition contained in this paper? A. I did.

Q. What did he say on that occasion, as nearly as you can remember?

A. Well, he said, "If you accept this present proposition, your stock, if the mine lasts a considerable period, will be worth more to you than if I exercise my opinion of January the 16th."

Q. I call your attention to a portion of this exhibit reading as follows: "In order to make investment safe only necessary to show at eight-dollar market, 35,400 tons of ore; ten-dollar, 25,500 tons of ore." Did you on that occasion hear anything said upon that subject by Mr. Taylor?

A. Yes, I did.

Q. What in substance, did he say on that occasion?

A. He said that he contemplated if he got such a deal as is here proposed from us, that he would go East, and try and interest some trust company, and he felt that 35,000 on a ten-dollar basis would put that mine on a banking basis—on an eight-dollar basis—; and on a ten-dollar basis he felt that 25,000 tons would put the mine on a banking basis. [367—362]

Q. On the occasion that that document was presented, was anything said by yourself, Mr. Murrish

(Testimony of C. W. Poole.)

and Mr. Nenzel with regard to accepting its terms?

A. Yes, we tentatively agreed on the terms in that.

Q. As there expressed?

A. Well, we thought we were agreeing as they are there expressed.

Mr. THATCHER.—(Q.) As there expressed, do you mean by that exhibit? A. Yes.

Q. I call your attention to the following portion of the exhibit: "Incorporation \$1,500,000, 300,000 preferred, 7% cumulative, or cum. redeemable 200,000 com. treasury 300,000 preferred, 300,000 common. Issue 200,000 preferred, 200,000 common, 100,000 preferred, 100,000 common to leave in treasury. 40% to present owner, 60% to Taylor et als." Was this document in its present form taken by yourself, Mr. Nenzel and Mr. Murrish away with you on that occasion?

A. Yes, we took it away at noon.

Q. Do you know the occasion of your seeing Mr. Taylor again on that day, April 1st, in the evening? A. Do I know the occasion?

Q. The occasion of it, yes?

A. Yes. After Mr. Nenzel and Mr. Murrish and myself had taken this document, we returned to the Brown Palace Hotel; we read it over carefully and scrutinized it, and came to the conclusion that we had not understood what Mr. Taylor was proposing in that document; we thought—

Q. You say you thought, was it said between you?

(Testimony of C. W. Poole.)

A. It was said between us; when we accepted Mr. Taylor's proposition tentatively, that we had understood we were to get 40 per cent of our own stock, and he was to get 60 per cent of it.

Mr. THATCHER.—Well, if the Court please, I move to strike [368—363] out that; I thought it might arrive at some place, but it has not, I move to strike out all of the answer as being purely hearsay, and not binding on the plaintiff in this action.

Mr. WHEELER.—It may go out.

Q. I will just ask the witness if after Mr. Taylor came to the hotel you heard any discussion with Mr. Taylor, or had any discussion with him with regard to the matters contained in the exhibit which was shown you?

A. Well, we called Mr. Taylor up, and he did come to the hotel in the evening, and then we discussed that document with him.

Q. What did you say to him, all three of you in the presence of each other, say to him?

A. Well, we told him that we had not understood the document; that it apparently meant something we had not understood in our discussion that morning. We expected to go—

Mr. THATCHER.—I move to strike that.

Mr. WHEELER.—Say what you told him.

A. We told him that we understood it to mean that he was to get 60 per cent of our holdings in those corporations, and we were to retain 40, and that that would be the condition if there should be

(Testimony of C. W. Poole.)

organized his new company; but, as a matter of fact, with the organization of the new company, we would not have forty.

Q. That is as set forth upon that plan?

A. As set forth upon that paper.

Mr. THATCHER.—I move to strike out all the testimony here given by the witness in response to the question of the conversation, on the ground that they cannot vary the terms of a written instrument, and it is nothing more than the negotiations which led up to the instrument itself.

The COURT.—Was this conversation before or after the document was signed? [369—364]

Mr. WHEELER.—Before the document was signed; this is the night of April the 1st, and the document was signed April the 2d.

The COURT.—This was all merged in the written agreement, was it not?

Mr. WHEELER.—As a matter of law, from that point of view; but we are now meeting the alleged fraudulent representations which led to that agreement, and this shows the conversation which we insist makes it obvious that there were no fraudulent representations.

Mr. COOKE.—It tends to rebut the testimony of the plaintiff. Plaintiff testified that the making of this paper and discussion had completely gone out of his memory. It seems to me it would be proper for us to show the extent of that discussion, for the purpose of determining what credit should be

(Testimony of C. W. Poole.)

given to his testimony as to what he remembers.

(Discussion.)

The COURT.—Well, I still do not see the force of these last questions and the testimony that has come out. The conversation with reference to the amount of ore necessary, and the price that would make it a profitable deal, I think that should remain in, but the other I think should be excluded.

Mr. COOKE.—In regard to the apportionment of the stock?

The COURT.—Yes.

Mr. WHEELER.—And we, of course, have our exception.

The COURT.—That, as I understand, is what you objected to; the apportionment as to the amount of the stock, because it tended to contradict the terms of the agreement entered into on the following day?

Mr. THATCHER.—Yes, sir.

The COURT.—Well, I will sustain the objection to that.

Mr. WHEELER.—(Q.) When, if ever, did you, Mr. Nenzel and Mr. Murrish [370—365] give your assent orally to the proposition finally embodied in Exhibit "C" annexed to plaintiff's complaint, that is, the contract of April 2d?

A. Mr. Nenzel and I agreed to it Tuesday evening, that would be April 1st; and Mr. Murrish gave his consent Wednesday morning, April 2d.

(Testimony of C. W. Poole.)

Q. Where did Mr. Murrish give his consent, that is, communicate his assent to Mr. Taylor?

A. In Mr. Taylor's office.

Q. At what time in the day, morning or afternoon, did you meet in Mr. Taylor's office on April the 2d.

A. We met in the forenoon, about nine or half past nine.

Q. What took place on that day with reference to the contract; was the contract, Exhibit "C" in its present form, prepared at the time that you reached Mr. Taylor's office on April the 2d?

A. It was not prepared at that time.

Q. After you arrived there state what took place with regard to the preparation of the contract, Exhibit "C"?

A. Mr. Taylor presented a typewritten contract to us, in which he had essentially embodied the terms as Mr. Nenzel and I had agreed with him on Tuesday night.

Mr. WHEELER.—Gentleman, have you that draft of contract; if you have we would like to inspect it.

Mr. THATCHER.—We have not, Mr. Wheeler.

Mr. WHEELER.—(Q.) Where did you last see that draft of contract?

A. The last time I saw it was in Mr. Taylor's office.

Q. What was done with it after it was presented by Mr. Taylor?

(Testimony of C. W. Poole.)

A. Well, Mr. Murrish took the contract and he read it; then he discussed it with me, and asked me if I had agreed to it, and I said I certainly have agreed to the substance of that, but as to whether what we agreed on is embodied in proper phraseology, or [371—366] legal phraseology, I don't know, Mr. Murrish; "Well," he says, "you understand English, don't you"? and I said, "Well, I—

Mr. THATCHER.—(Q.) Was this conversation in the presence of Mr. Taylor?

A. Yes, Mr. Taylor was right there. He says, "You understand English, don't you"? I says, "Yes, I think I do"; he says "Legal phraseology is no different from ordinary English," and he says "Is this intelligible to you"? and he proceeded to point out that the party of the first part and the party of the second part were confused in the body of the contract; that is, in places they were reversed, the party of the first part became the party of the second part; and he said "I will never agree to sign anything of that nature." Then Mr. Taylor proposed that he rewrite it, and embody the same essential facts in what he considered proper legal phraseology. Mr. Murrish and Mr. Taylor then retired to another room, and started to dictate this to the stenographer, and I was in and out of that room several times during the dictation, but I paid no particular attention to that thing, as I didn't pretend to understand the writing of contracts.

(Testimony of C. W. Poole.)

Q. Now after this dictation was in progress and before the contract in its proposed form came from the typewriter, or was signed, did you have any conversation with Mr. Taylor in which any map was used, or in any way written upon or drawn upon?

A. I did.

Q. Up to that time, that is, the moment on April 2d while this contract was in course of preparation, and before it was signed, up to that time had there on that day, or any previous day, been any discussion between you and Mr. Taylor in the course of which any plat had been written or drawn upon by either of you? A. No.

Q. On this day, the 2d day of April, what conversation took place between you and Mr. Taylor, in which a plat was discussed or used or drawn upon? [372—367]

A. Well, Mr. Taylor had several extra copies of this photostat, which is called plate 5 in Mr. Bancroft's report.

Q. Were they annexed to copies of the report, or were they separate and distinct?

A. They were additional copies that he got out of his own files or some one else's, I could not say.

Q. At any rate, they were not a part or parcel of any other document or paper?

A. Oh, no. And Mr. Taylor presented me one of those, and he says, "I wish you would put the additional development work on it that has been

(Testimony of C. W. Poole.)

done since Mr. Bancroft's examination of January the 22d."

Q. Now this, I understand you, he said, and this you did after Mr. Murrish had proceeded to draft or dictate the proposed form of contract?

A. Yes.

Q. What date was it?

A. It was Wednesday, April the 2d, in the forenoon, somewhere around ten or half past ten o'clock, may be later or it may be a little earlier; it was in the forenoon.

Q. Now who was present in the room at the time that this conversation between you and Mr. Taylor took place? A. Mr. Nenzel.

Q. Where was Mr. Murrish?

A. I think that he was dictating the contract; I could not be certain of that fact because after Mr. Murrish had dictated this contract he left, and whether he had the contract finished, and had gone, or was still dictating it, I could not be certain.

Q. State fully what was said and done on that occasion at that time and place?

A. Mr. Taylor handed me one of these photostats, this plate 5 in Mr. Bancroft's report, and said "I wish you would put additional work on there which has been done since Bancroft's examination, and also I wish you would show the additional tonnage or ore which has been developed by that additional work, and use the method that Bancroft has used in his report"; and I said, [373—368] "Mr. Tay-

(Testimony of C. W. Poole.)

lor, it is very easy to put additional work on there, but it is not easy to calculate the additional tonnage according to Bancroft's method, because it is not clear what method Mr. Bancroft has used in his report in calculating tonnage"; "Well," he says "I have the tonnage method used by Mr. Bancroft"; he then got some memorandum or else letters, or letters and telegram, but it certainly was a written document of some kind, setting forth how Mr. Bancroft calculated tonnage according to different development.

Mr. WHEELER.—Have you in your possession, gentlemen, or under your control, any document, either in Mr. Bancroft's handwriting or any telegram, or any data or memorandum, showing Mr. Bancroft's method of calculation, if so, we would like it.

Mr. THATCHER.—If we have it we will produce it.

Mr. WHEELER.—Proceed.

A. At that time I call Mr. Taylor's attention to the fact that the data upon the map which I had brought back there did not enable any one to calculate tonnage of ore; that it was sufficient to calculate tonnage, but that the tonnage was not necessarily ore. He said "That does not make any difference, what I want to do is to get sufficient data to present to Mr. Bancroft to show him that there has been enough additional development work done there since his last visit to warrant him going again, and I want to use that to urge him, as I have been

(Testimony of C. W. Poole.)

urging him, to go, and he does not want to go; and I want to use this to urge Mr. Bancroft to go there again”?

Mr. COOKE.—Go where?

A. To the mine, the Nevada Humboldt Tungsten Mine, and examine it again. I said, “All right, then, Mr. Taylor, I will assist you in getting that data from these maps which I have with me, but it will be necessary for us to have an engineer’s scale in order [374—369] to scale the distances off my map,” because there were no distances measured, simply a graphic representation according to scale. So he searched through Mr. Bancroft’s office, particularly in another room where there was a drafting table, and he could not find an engineer’s scale, so we used an office scale, an ordinary office rule, showing inches and eighth of inches, while my map was on a scale of forty feet to the inch. Mr. Taylor then took this extra photostat and used one scale and I used another, and I scaled off my map the distances on my map, and he set them down graphically and he also wrote down the distances. After that—

Mr. WHEELER.—(Q.) One moment, please. You speak of “my map,” what map do you refer to?

A. I refer to the mining map of the Nevada Humboldt Tungsten Mines Company, I had with me.

Q. I hand you a map upon which are the words, “S. P.” Vein, Looking N. W., I ask you whether

(Testimony of C. W. Poole.)

or not that is the map just referred to by you as being the map which you had with you on that occasion?

A. That is the map, there have been some additions since that occasion, it is not exactly in the same condition.

Q. This is the identical map you had with you, although some changes have taken place on it since? A. Yes, the identical map.

Mr. WHEELER.—I offer the map in evidence, and ask that it be marked our Exhibit “Y.”

(The map is admitted in evidence and marked Defendant’s Exhibit “Y.”)

Q. Turning to Defendant’s Exhibit “Y,” I call your attention to the figures appearing thereon, and the lines, and ask you to state as accurately as you can, and in such way that it will be intelligible in the record, what additions were made to that map at a period subsequent to the 2d day of April on this occasion when you and the [375—370] plaintiff were together?

A. All of the lead pencil marks purporting to show mine workings, with the exception an extension of a level in the northeast corner of the map. Also the figures—am I testifying now as this map was when we presented it right then and there at that occasion?

Q. What I want you to do is to describe what is there on the map which was not there at that time, and describe it in such way that the record,

(Testimony of C. W. Poole.)

with the map in hand, will show what you are testifying to.

A. All figures showing percentage, average width or extremes of width were on the map at that time; there are other figures here scattered throughout the map which were not on there at that moment.

Q. Can you specify those that were not on there at that moment?

A. The figures 4200 was not on there; the figure 9250 was not on there; the figure 2048 was not on there; the figure 1080 was not on there; the figure 4860 was not on there.

Q. Have you now told us all the figures that were not on there? A. I have.

Q. And have you designated the lines that were not on there? A. I think so.

Q. Were any extensions of the shaft now appearing on there that were not there at that time?

A. This extension in lead pencil was not on there at that time.

Q. By this "extension in lead pencil" you mean—

A. On the main working shaft.

Q. On the main working shaft coming down to the red line?

A. Well, from the ink line downward, there was nothing at that time.

Q. Now you have mentioned use by you of the ruler scale, you say [376—371] you had one and Mr. Taylor had another, or that you used the same ruler for that purpose?

A. He had one and I had one.

(Testimony of C. W. Poole.)

Q. Describe what sort of rules they were.

A. Well, they were office rulers, I think they had advertising matter printed on them; they were twelve-inch rulers.

Q. Now proceed and tell just what took place from the time that you began to use the ruler and the time that he began to use the ruler?

A. Well, we both started to use the ruler together, I scaled this map, and he transferred it to his photostat.

Q. By this map you mean Exhibit "Y."

A. Yes.

Q. You say he transferred it to his photostat?

A. Yes.

Q. What do you mean by that, transferred it from what?

A. Well, I mean that he drew the same distances which I was scaling on his own map, photostat map there, but to another scale, because his map was of a different scale.

Q. Did he look at your map, and then put down the lines, or did you call off the lines and angles to him?

A. I called off the distances, there were no angles.

Q. So much then as to the distances; did you at that time give him any figures, or read to him any figures?

A. Well, the distances were figures, they were feet.

Q. Well, were the number of feet put down by him upon this other map, this photostat, which is

(Testimony of C. W. Poole.)

not in evidence, and which he was then using?

A. That is my recollection of it, he not only drew the distances, but he put the number of feet down also.

Q. What else took place?

A. Well, he then referred to Mr. Bancroft's method of calculating ore as blocked out on one side, two sides, three sides, four sides, and as to whether the two sides were at right angles or parallel, and from that data he proceeded to calculate the number of tons of ore in a given block, and I [377—372] wrote them down on this photostat map.

Q. Who did the calculating, you or Mr. Taylor?

A. Mr. Taylor did the calculating, because I didn't know—it started out that I didn't know how many cubic feet of ore Mr. Bancroft called a ton, and he finally dug that figure up, which was fourteen cubic feet, as I recall it, per ton of ore, and from that point we started to calculate, and he started the calculations.

Q. You say we started to calculate, who calculated, you or he, or both?

A. He did the calculation, he did the mathematical calculations from the dimensions I had given him and from the divisions for tonnage, and I entered them on the photostat map?

Q. And he gave you the results which you entered on the photostat map? A. He did.

Q. Then the figures, other than the representation

(Testimony of C. W. Poole.)

of feet, were furnished you by him, as I understand it? A. Yes, they were.

Mr. THATCHER.—I object, it calls for the conclusion of the witness, and assumes something not in evidence.

The COURT.—Well, the question is leading.

Mr. WHEELER.—(Q.) Who wrote down the figures on that photostat map? A. I did.

Q. They were all in your handwriting?

A. All with the exception of distances; I think he wrote the distances down, as well as drew them.

Q. When you finished what was done with the photostat map you were using on that day?

A. It was left with Mr. Taylor.

Q. Is the map plate 5, annexed to Exhibit 15, the same photostat that was used on that day in Mr. Taylor's office by you and Mr. Taylor in the way you have just indicated? A. No, it is not.

Q. Upon the map which you used on that day was there any statement, [378—373] of were there any figures indicating the number of tons in any portion of the area represented by the map?

A. There were figures representing the tonnage, yes.

Q. State what they were.

A. What the tonnage figures were?

Q. Yes.

A. Well, I recall one quite distinctly, and that is the figure 4200; that is certainly one of the figures that we got as a result of that calculation; I am not certain positively as to the others; I can be certain of

(Testimony of C. W. Poole.)

this, that there was no block in which there was 42,000 tons. I can further be certain that the sum total of the tonnage represented in all the blocks was not 42,000.

Q. Was it more or less? A. It was less.

Mr. WHEELER.—Gentlemen, if you have that map in your possession or under your control, photostat described by the witness with figures thereon in his handwriting, and other letters and figures thereon in the handwriting of Mr. Taylor, we would request its production.

Mr. THATCHER.—We haven't it; if we have I don't know it, I would like to see it myself.

Mr. WHEELER.—(Q.) Did you on that occasion, or on any previous occasion, or at any time prior to the moment that the signatures were placed upon the contract, Exhibit "C," on the 2d day of April, 1919, say or state to Mr. Taylor that there were 60,000 tons of ore either blocked out or developed or in sight in that mine?

A. I certainly did not.

Q. Did you make any representations or use any words to that substance or effect?

A. I certainly did not.

Q. Did you on that occasion, or on any occasion prior to the entering into the contract Exhibit "C," state or represent to him that there were in that mine either blocked out or in sight or developed [379—374] any quantity of ore whatever?

A. I did not.

(Testimony of C. W. Poole.)

Q. By that I mean specific quantity and number of tons? A. I did not.

Q. When was the contract Exhibit "C" signed with regard to the conversation that you have just testified to?

A. The contract was signed subsequent to the conversation.

Q. Do you remember how soon the typewriting on the contract was completed, whether the contract was signed on the morning or the afternoon of April 2d?

A. It was signed in the afternoon of April the 2d.

Q. Intermediate to the time testified to by you, in which these figures were put down on the photostat on the 2d day of April and the time that the contract was signed, was there any other or further discussion in which tonnage or development or figures of ore or ore bodies was mentioned?

A. No, there was not.

Q. Were the figures as to values, or any of them appearing on plate 5, other than those which appeared upon the original photostat, placed either by you or by Mr. Taylor upon the photostat which you say was used on the 2d day of April in the conversation that you had with Mr. Taylor?

A. I don't think the percentages were placed on that photostat, though I could not be certain of that. May I amplify that statement?

Q. Yes, make any explanation that is responsive.

A. I had cautioned Mr. Taylor against the unre-

(Testimony of C. W. Poole.)

liability of those estimates on the map, and I scarcely think that I would have put them down myself on that photostat; he may have put them down and I not know it, as he had our maps most of the time while we were in Denver, but I don't recall having put those percentages down myself, and I scarcely think I would have done it. [380—375]

Q. By that photostat what photostat do you mean?

A. I mean the photostat I have just described as prepared by Mr. Taylor and myself.

Q. On the 2d day of April? A. Yes.

Q. When you speak of those figures you cautioned him against, what figures do you refer to?

A. I refer to the figures in this exhibit of our map, whatever you call that, the one you just put in evidence.

Mr. THATCHER.—The mine map, Exhibit “Y”?

A. Yes.

Mr. WHEELER.—(Q.) By that you mean the figures—

A. (Intg.) The figures showing certain percentages, shown on the map in several places.

Q. The figures showing the percentages, not the figures showing the tonnage?

A. No, just the figures showing percentages.

Q. What did you say to him on that subject, you say you cautioned him?

A. I told him those figures were merely estimates which had been placed on that map by John Huntington, who was the mining engineer who had

(Testimony of C. W. Poole.)

brought this map up to date, and that Mr. Huntington had gotten that information from Mr. Morrin, who was the superintendent, and Mr. Morrin had arrived at those values by panning in the mine; and he knew, as well as I did, that panning was a very unreliable way of arriving at the value of ore.

Q. This you say was what you said to him?

A. Yes.

Q. How soon after the contract Exhibit "C" was signed did you leave Denver?

A. Well, I left in the afternoon on the earliest train I could get, I think it left around three or four o'clock.

Q. Did you have any other conversation with Mr. Taylor after the contract was signed in which tonnage was mentioned, or any figures were discussed? [381—376]

A. No, I did not.

Q. Do you recall seeing Mr. Taylor and Mr. Jackson at the mine at any time in the month of May, 1919?

A. I do.

Q. On that occasion did you go into the mine with either of those gentlemen?

A. I went into the mine with Mr. Jackson.

Q. Who else accompanied you upon that trip?

A. Mr. Morrin, the superintendent of the mine.

Q. What portions of the mine did you visit on the occasion of that trip?

A. We visited the third level north and the shaft all the way down, particularly the part of the shaft between the fourth and fifth levels.

Q. Any other part or portion of the mine?

(Testimony of C. W. Poole.)

A. Not that I recall; we may have gone into the third level south, and we may have gone up on the second level south where there was some water; but we were visiting particularly the shaft between the fourth and fifth levels and the third level north from the main shaft.

Q. What did you do while in the mine?

A. Mr. Morrin and I panned a great deal.

Q. Who was Mr. Morrin?

A. Mr. Morrin was the superintendent of the mine.

Q. When previously to that visit had you last been in the mine?

A. I had been in the mine on April 9th.

Q. Prior to April the 9th—that then was after you returned from Denver? A. Yes.

Q. Prior to April the 9th what had been your last previous visit to the mine?

A. At the time of Mr. Bancroft's examination.

Q. So you had not been in that mine from the time of Mr. Bancroft's examination until after the contract Exhibit "C" was signed? A. I had not.
[382—377]

Q. How many pannings approximately were actually made in the mine in the presence of Mr. Jackson on the day you have referred to when he visited the mine in company with Mr. Taylor?

A. In Mr. Jackson's presence?

Q. Yes.

A. Well, I could not be certain. Mr. Jackson was not with us every minute, and we were panning

(Testimony of C. W. Poole.)

constantly; he saw a great many pannings, just how many I could not say.

Q. Where did you take or make pannings on that day?

A. In the third level north, and in the shaft between the fourth and fifth levels.

Q. Did you make pannings of all those portions of the mine while in the mine on that occasion?

A. No, we brought some of them to the surface.

Q. You made some in the mine?

A. We made some in the mine and we brought a few samples as we came to the surface, we wanted to show those to Mr. Taylor.

Q. The pannings you took in the mine were taken in what way, describe it to the Court, please.

A. The samples for the pannings?

Q. Yes.

A. Well, they were taken in numerous ways; some places we made a grab of the muck pile, that is, simply grabbed a handful here and there from the broken ore, but in most places we chipped out pieces into our pan and mortared them up and panned those, because we were particularly interested, or I was, in knowing what certain ground that we had already gone through were panning, and we were forced to take samples out of solid as well as out of the muck pile.

Q. Did you dig any trenches across the sides or width of the vein across the roof, or across the bottom?

A. Oh, no, no we didn't dig trenches, we just

(Testimony of C. W. Poole.)

simply took pieces [383—378] here and there; I would not say our sampling was absolutely accurate sampling, in fact I know it was not.

Q. Pursuing that method on that day what was the result of the pannings taken in the mine?

A. We got some good pannings and some poor pannings.

Q. Were all of the good pannings found in different places from the poor pannings, or did you find some poor pannings and some good pannings in the same vicinity?

A. Well, in the third level north there was a great question in my mind as to whether that was good ore or poor ore, and we panned very closely there. No, I don't recall that we got a good panning at a particular point, and then went back and got a bad panning, but I do recall that the nature of that drift was spotty, that is, there was ore here and there.

Q. Did you make any pannings at places that had been developed since the 2d day of April?

A. Well, all this shaft had been developed since the 2d day of April.

Mr. COOKE.—(Q.) All of the shaft where?

Mr. DAVIS.—(Q.) You mean all below the fourth level?

A. All below the fourth level is the part I am speaking about now.

Mr. WHEELER.—(Q.) So all the pannings you took below the fourth level were pannings from ground that had been developed after the contract of

(Testimony of C. W. Poole.)

April 2d had been entered into? A. Yes.

Q. In the bottom of that shaft did you take any pannings? A. Yes, we took numerous pannings.

Q. With what results?

A. That we got some very good ore.

Q. What pannings did you take and complete on the surface after [384—379] you had come out of the mine?

A. I recall that we took one from the bottom of the shaft and one from some point on the third level north, but exactly where that panning on the third level north came from I don't now recall.

Q. While you were in the mine on that occasion did you make any attempt to measure up the tonnage that was in the mine? A. No.

Q. Did you on any other occasion prior to your coming to San Francisco in the latter part of May or the first part of June, 1919, make any measurements for the purpose of checking up the quantity of ore in the mine?

A. Yes, I did on one occasion when Mr. Taylor was present, that was after April the 9th; I did not go down the mine with Mr. Taylor on a visit which he made to the mine in April, and at that time I took a tape underground with me, to see that the representations of distances that I had made in Denver were correct, and he and I measured several places, and after measuring a few I said, "Do you want to go all through, and measure them"? he said "No that is enough, I am satisfied that the distances are correct."

(Testimony of C. W. Poole.)

Q. So you had been in the mine one more time than you remembered a moment ago?

A. Yes, I wish to correct that.

Q. You say the measurement of distances which you represented in Denver, what do you mean by that statement?

Mr. THATCHER.—I object, the witness has already testified.

Mr. WHEELER.—(Q.) Well, explain what representations of distances you had made when in Denver?

A. Well, I had presented our mine map with certain extensions on which had been made subsequent to Mr. Bancroft's report, and I wanted to convince Mr. Taylor that that work had actually been done. [385—380]

Q. Then the representations you referred to a moment ago were representations already referred to by you as being upon that map which you scaled and gave him the distances of? A. Yes.

Q. On April 2d?

A. The map which I gave him on April 2d, yes.

Q. On this occasion when Mr. Jackson was there, did you make any measurements whatever of the quantity of ore in the mine? A. Oh, no.

Q. Did you go into the mine for that purpose, was anything said about it before you went into the mine? A. No.

Q. What if anything was said as to the purpose for which you were going into the mine, said in the

(Testimony of C. W. Poole.)

presence either of Mr. Jackson or Mr. Taylor, before you went into the mine?

A. Well, before going to the mine Mr. Taylor had shown me a map which purported to show assays which Bancroft had gotten at his second examination, and they were all very low; the map was on tracing paper, and was drawn with a red pencil, and had assays on it on the third level north, and on the shaft between the fourth and the fifth levels; these assays were all very low, so—

Mr. WHEELER.—One moment, please. Gentlemen, have you that map?

Mr. THATCHER.—We have not.

Mr. WHEELER.—Proceed.

A. These assays were all very low, and when we got to the mine I took this map and showed it to the mine foreman, and I said “There is part of what Mr. Bancroft has found in this mine at his second examination.”

Q. Did you say this in the presence of Mr. Taylor and Mr. Jackson, or only Mr. Jackson?

A. Yes, both of them, they were both there; and the foreman looked at the map, and he says, “I don’t care what Bancroft [386—381] says, there is ore in that third level north, and there is ore in the bottom of the shaft,” and he says, “If you will come down the mine I will prove it to you,” and we went down in the mine with that point in mind, because from the conversation I had had with Mr. Taylor, I didn’t know whether these were Bancroft’s assays or what they were, and I thought if they were Bancroft’s

(Testimony of C. W. Poole.)

assays it will be very easy to check them up by panning; that is, one can have some idea as to what the mine is by assays, or as to whether there is some ore in it.

Q. The pannings that you have spoken of having taken on that day were made, or were they not made in the portions of the mine that you have just referred to?

A. Yes, that is the portions of the mine they were made in.

Q. Now as to the third level, what was disclosed by the pannings; what was the result of the pannings made of ore in the third level?

A. That there was good ore and bad ore.

Q. But it was not one solid mass of good ore as disclosed by your pannings, is that right?

A. It was not one solid mass of good ore and not one solid mass of bad ore, or waste?

Q. But there was some good ore and some bad ore at every place?

A. At different places the ore was spotted; there was spots of bad and spots of good, that is what I mean to say.

Q. Did Mr. Taylor tell you what assays were represented upon that map, whose assays?

A. He said they were Bancroft's assays; that is they were assays of the samples taken by Bancroft at his second examination.

Q. Among them does there purport to be any of ore in the shaft?

(Testimony of C. W. Poole.)

A. There wasn't a single sample which showed any ore in the shaft. I may add at this point that from the appearance of this map it was not a complete map even of those portions which it showed. As I [387—382] understood Mr. Bancroft's method of sampling he took samples every ten feet, and these assays platted on that map were not platted every ten feet, but there was an assay here and there, just portions of the samples.

Q. Were these pannings taken in places where the development work had taken place prior to or subsequent to the second day of April?

A. Well, the developments in the third level north had taken place in the main, prior to the 2d day of April, practically all of those. The development in the shaft, the shaft was ten feet below the fourth level when we went back to Denver, went back to Denver in March, the rest of it was subsequent—the rest of the shaft was subsequent to the Denver conference.

Q. As I understood you a moment ago, and perhaps I didn't get you correctly, you went into the shaft on that occasion with the idea of examining the ores in the shaft in order to check up this report of Bancroft's?

A. Particularly between the fourth and fifth level, because that is all the assays we had, or Mr. Taylor had.

Q. Was there upon that map anything that purported to be an assay of ore between the fourth and fifth level?

(Testimony of C. W. Poole.)

A. No, there wasn't a single sample showing any ore.

Q. Then what was the occasion of checking that portion of Mr. Bancroft's work?

A. Well, the very bottom of the shaft showed no ore, and the foreman insisted there was ore in the bottom of the shaft.

Q. And Mr. Bancroft's assays showed no ore in the bottom of the shaft? A. Yes.

Q. And the foreman insisted that you should go down there to check that? A. Yes.

Q. And you did go down?

A. Yes. 388—383]

Q. Did you make your pannings there?

A. We made pannings down in the mine in the shaft where there was water down there, and then we brought one sample on top to show Mr. Taylor.

Q. What was the result of the pannings you took down in the mine?

A. Down in the mine or down in the shaft?

Q. I mean to say in the shaft, in the bottom of the shaft?

A. In the bottom of the shaft on the north side we found very good ore; on the south side we found low grade ore, that is, in the bottom, and from there—

Mr. THATCHER.—(Q.) Do I get that right, the north side was good ore and the south side was low grade?

A. Was very low grade; I would not say it was

(Testimony of C. W. Poole.)

ore at all, it was simply a low grade vein.

Mr. WHEELER.—(Q.) However, this was the bottom of the shaft?

A. Yes, sir.

Q. And it was the bottom of the shaft as it appeared 100 feet or thereabouts below where it had been on April the 2d? A. Yes.

Q. But in Mr. Bancroft's report, or as it was represented to you, there was an assay appearing as having been taken from the bottom of the shaft?

A. Yes, there was an assay.

Q. Now you say you took one sample up to the surface, was that done in the presence of Mr. Jackson or Mr. Taylor, or either of them? A. Yes.

Q. With what result?

A. Mr. Taylor said he was not interested in any panning, and he was going to abide by Mr. Bancroft's report.

Q. What did that assay show?

A. It showed good ore, it came from the north side of the shaft. [389—384]

Q. That came from the north side, and not from the south? A. Yes.

Q. In the course of that conversation did you say, in substance or effect, either to Mr. Jackson or Mr. Taylor, or in the presence of either of them, that Mr. Bancroft's report on the tonnage of that mine was right? A. I certainly did not.

Q. Was there any discussion as to the tonnage in the mine? A. There was not.

(Testimony of C. W. Poole.)

Q. Had you on that occasion made any investigation of the tonnage in the mine? A. I had not.

Q. Had you intermediate to that occasion and the time you had been in Denver, the 2d day of April, 1919, made any investigation of the tonnage in the mine? A. I had not.

Q. Do you recall a meeting in San Francisco with Mr. Jackson, Mr. Bayless, Mr. Taylor, in which Mr. Jackson proceeded to state certain matters concerning the transaction of April the 2d?

A. Was I present?

Q. Yes. A. Yes, I was.

Q. Who else was present on that occasion when Mr. Jackson was making his statement?

A. The first occasion when Mr. Jackson made any remarks there was present Mr. Nenzel, Mr. Murrish and Mr. Jones and myself, and Mr. Taylor and Mr. Bayless.

(A short recess in taken at this time.)

Q. Mr. Poole, did you ever either at the mine or in Lovelock in the company's office, or elsewhere in the State of Nevada, say anything in substance or effect that you had represented to Mr. Taylor that there were 60,000 tons, or at least 60,000 tons, or any number of tons whatever, of ore in the mine belonging to the defendant corporation, the Nevada Humboldt Tungsten Mines Company?

A. No, I never did. [390—385]

Q. Did you ever silently acquiesce in any statement made in your presence to the effect that you

(Testimony of C. W. Poole.)

had represented to Mr. Taylor that there were 60,000 tons of ore in the mine belonging to the defendant corporation, the Nevada Humboldt Tungsten Mines Company?

A. Not 60,000 tons, no.

Q. You say not 60,000 tons; well, any other number of tons?

A. Well, there may have been some mention of tonnage in that conversation in San Francisco, I can't be positive about it, I don't recall it myself, but my associates say that something like that took place.

Q. Never mind what your associates say; the question is did you ever by word of mouth or by your silence intend to acquiesce or agree to any statement made in your presence by any person to the effect that you had represented that there were 60,000 tons of ore, or thereabouts, or any other sum approximating that amount, in the mine belonging to the defendants, Nevada Tungsten Mines Company?

Mr. THATCHER.—Objected to as calling for the conclusion of the witness, and as to his intentions. He can state what he did and what was said, and the Court can judge as to the intentions.

Mr. WHEELER.—It was said by some witness here that he nodded his assent.

Mr. THATCHER.—That is all right, I don't object to that.

The COURT.—He can deny that if he wishes;

(Testimony of C. W. Poole.)

but as to stating what his intention was, I don't know.

Mr. WHEELER.—(Q.) Did you on any occasion in San Francisco say in response to any statement in substance or to the effect that you had represented to Mr. Taylor that there were 60,000 tons of ore developed in that mine, meaning the mine belonging to the defendant corporation, the Nevada Tungsten Mines Company, say yes, that is so? [391—386]

A. No, I never did.

Q. Did you on any occasion in response to a statement by any person in our presence to that effect, in substance, nod your head affirmatively?

A. No.

Q. Did you assent either orally or with a nod of your head, or with the phrase, yes, that is so, or otherwise, to any statement made by Mr. Jackson in your presence, alleged to have been made by you to Mr. Taylor, in substance or to the effect that the mine, meaning the mine of defendant Nevada Tungsten Mines Company, contained 60,000 tons of commercial ore? A. No, I did not.

Mr. WHEELER.—Take the witness. Let it be understood, please, by opposite counsel that when I have said Nevada Tungsten Mines Company, I meant Nevada Humboldt Tungsten Mines Company, and I was so understood by the witness. That is the fact, is it not, Mr. Poole, that you understood I meant Nevada Humboldt Tungsten Mines Com-

(Testimony of C. W. Poole.)

pany? A. That has been my understanding.

[392—387]

(By Mr. COOKE.)

Q. Mr. Poole, in the conference which you testified you had at Denver on or about April 2d, 1919, what, if anything, did Mr. Taylor say as to his reliance upon the estimates which you told him were furnished by Mr. Morrin?

A. He told me that Mr. Bancroft—

Mr. THATCHER.—I am going to object to that. This was the first of April, was it?

Mr. COOKE.—Either the first or second.

Mr. THATCHER.—It don't seem to me this witness has testified as yet to any estimates given by Mr. Morrin; if he did I would like to have the testimony.

Mr. COOKE.—He stated certain figures in connection with these matters were panning estimates by Mr. Morrin.

Mr. THATCHER.—If you are referring to panning, all right; assays are values.

The COURT.—Proceed.

(The reporter reads the question.)

A. He told me he didn't place any great reliance in Mr. Morrin, because Mr. Bancroft had so reported that Mr. Morrin was not very reliable, and he didn't like him.

Q. Mr. COOKE.—What, if anything was said as to taking his percentage estimates for what they were worth?

(Testimony of C. W. Poole.)

A. Well, I told Mr. Taylor that these were Morrin's estimates, and he could take them for what they were worth; then is when he told me that he didn't place any great reliance on any of Morrin's estimates, because Mr. Bancroft had reported Morrin was not a very reliable man, and he didn't like him.

Q. In that connection, or at any time in that conversation, did Mr. Taylor say in whom he did place any reliance with reference to the matter of percentage estimates, tonnages developed, or the like? [393—388]

A. Yes, he said that he was going to absolutely rely on Mr. Bancroft; that while he didn't like him as a man, he certainly admired him as a technician; he went on to cite an instance of Mr. Bancroft's smallness as a man, he said that he had obtained a valuable—

Mr. THATCHER.—Objected to on the ground it is incompetent, irrelevant and immaterial.

Mr. COOKE.—I am asking for the conversation.

The COURT.—It don't seem to me there is any necessity of drawing that out.

Mr. COOKE.—It has some little relevancy to the matter; I don't insist upon it, though.

Q. What, if anything, did Mr. Taylor say with reference to when Mr. Bancroft would be available to take this work up in the mine, this new work that had been done since the former Bancroft report?

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(Testimony of C. W. Poole.)

Mr. THATCHER.—This was in April, was it, the first of April?

Mr. COOKE.—Yes, this is all April I am talking about.

A. As I recall that conversation, he told us that Mr. Bancroft was either in San Francisco, or would shortly be in San Francisco and he expected he would come out right away, and Mr. Taylor expected to come with him.

Q. Was anything said as to the number of days or weeks by Mr. Taylor within which he expected to have Mr. Bancroft at the mine in company with himself to make this investigation?

A. He expected to come immediately, because, as I recall it, Mr. Bancroft could only come in the very near future.

Q. What, if anything, was said by Mr. Taylor at that time to yourself with reference to your connection with the property, in the event that he made a deal, your future connection with the property? [394—389]

A. Well, he led me to believe that I was going to be the superintendent.

Q. Well, I am asking what he said, if you can give it.

A. Well, when I made the representation as to distance and assays, and the explanations accompanying them, I told Mr. Taylor, I said, "I will vouch for these distances, because Mr. Huntington is an accurate surveyor, but I won't vouch for these estimates on here as having any meaning," and I

(Testimony of C. W. Poole.)

said, "I want you to get that clearly in mind, because I don't want to make any misrepresentations to you"; and he says, "The only effect that any misrepresentation on your part would have on me would be to cause me to lose confidence in you, and therefore I would not use you as superintendent of the property."

Q. Previous to that had he said anything about expecting, or intending to use you as superintendent of the property?

A. Well, in San Francisco in January, when we entered into that contract, Mr. Thane in Mr. Taylor's presence, and also in Mr. Bancroft's presence, had said we would like to have you join us in this venture, and we would like to have you be superintendent of the property.

Q. What, if anything, did that conversation or those conversations where they spoke to you upon that subject, have to do with your attitude with reference to being conservative or otherwise, in discussing the property?

Mr. THATCHER.—Object to the question as leading, and calls for the conclusion of the witness.

The COURT.—The question is objectionable.

Mr. COOKE.—(Q.) What, if anything, did the financial condition of the Nevada Humboldt Tungsten and the Tungsten Products have to do with your making this trip to Denver? [395—390]

Mr. THATCHER.—I object on the ground it is incompetent, irrelevant and immaterial.

(Testimony of C. W. Poole.)

Mr. COOKE.—I want to show if I can, in this way, that the condition with reference to deferring the indebtedness, which was then matured and pressing us, was an inseparable part of this contract which was afterwards negotiated.

Mr. THATCHER.—If that is the case I will withdraw the objection; but I object to it if it is intended to be used to vary the terms of the written contract itself; if they want to show what the conditions were for any other purpose, I don't care.

Mr. COOKE.—It is not offered to vary the terms. I will say very frankly my purpose is to show they went down there oppressed by reason of the financial condition of the company, and these debts piling on them, and they didn't go down there simply for the purpose of getting a substitution of creditors; it was necessary for them to get time to work out, and this was why this 7 per cent preferred stock arrangement was an inseparable part of their proposed plan, something of that kind that would give them time; just simply to go down and have a substitution of creditors would amount to absolutely nothing.

Mr. THATCHER.—If that is the case, I am going to object on the ground it is introduced for the purpose of varying the terms of the contract.

The COURT.—Objection sustained.

Mr. COOKE.—(Q.) In the conversation that was had at Denver during these two or three days immediately preceding the signing of the agreement of April 2d, was anything said by Mr. Taylor or

(Testimony of C. W. Poole.)

Mr. Murrish, or by any of the parties there, relative to other persons who might be interested in the property?

Mr. THATCHER.—Objected to as incompetent, irrelevant and immaterial. [396—391]

The COURT.—I don't see the relevancy of it, Mr. Cooke.

(Discussion.)

The COURT.—I will sustain the objection.

Mr. COOKE.—We desire the benefit of an exception on the ground the testimony is competent for the purpose of tending to prove that the representations were not made as alleged.

Mr. COOKE.—(Q.) Calling your attention to some time about the middle of April, 1919, when Mr. Taylor visited the mining property, was that in company with you?

A. Yes, I met him at Imlay, and accompanied him to the mine.

Q. Did anybody else go with you to the mine?

A. Nobody from Imlay to the mine, no.

Q. At that time did Mr. Taylor say anything about Mr. Bancroft, and any reasons why he did not accompany him to the property?

A. He said that Mr. Bancroft had gone on some other examination.

Q. What if any examination of the property did Mr. Taylor make at that time?

A. He went all through the mine, and he visited the mill, and he went over the surface some; not very much over the surface, however.

(Testimony of C. W. Poole.)

Q. How nearly can you fix the date of that examination?

A. I can't fix it within ten days; I know I went east about the first week in May, and I know that Mr. Taylor had been there ten days or two weeks before I went east; that is as close as I can come to it.

Q. So far as you know, did he have any business or object in visiting the property, other than an examination of it?

Mr. THATCHER.—Objected to as incompetent, irrelevant and immaterial, and calls for the conclusion of the witness.

Mr. COOKE.—(Q.) Well, what did he say as to what he wanted to go to the property for?

A. He said he came down to see it. [397—392]

Q. Did he see it? A. Yes, he saw all of it.

Q. What was the extent of his examination with reference to being thorough, or otherwise?

Mr. THATCHER.—Objected to as calling for the conclusion of the witness.

Mr. COOKE.—(Q.) What was the extent of it, as to where he went and what workings he visited?

A. He saw all of our underground main workings; he measured up quite a few of the workings with me; he panned some himself, and Mr. Morrin and I panned a great deal for him.

Q. Was Mr. Morrin with you during the entire trip through the mine? A. Yes, he was.

Q. Just you three?

(Testimony of C. W. Poole.)

A. Yes, that is all; we met the workmen in the mine as we went about.

Q. How did he come to do any panning, at whose suggestion was that? A. I suggested it to him.

Q. How did you suggest it, what did you say?

A. Well, it was after we had measured up the distances; I said you had better take some pannings here and get some idea of these values yourself.

Q. These distances that you say you measured, what did those measurements refer to?

A. Well, those were the distances which I had given him in Denver, as new data since Bancroft's report in January.

Q. And about how many pannings did he take?

A. Well, he took five or six, but he was not a skillful panner, and he was satisfied to let us do the panning.

Q. How many pannings did you and Mr. Morrin take in his presence while you were together?

A. We took a great many, a hundred I should say.

Q. A hundred pannings? A. Yes. [398—393]

Q. How long a time did you spend in the mine doing this panning and examination, approximately?

A. I think we were in the mine about four hours.

Q. Were there any workings or openings underground that you didn't visit?

A. There were no openings in the mine, in our main workings, that were not visited; there are other workings in that property which Mr. Bancroft

(Testimony of C. W. Poole.)

does not mention in his report, or if he does mention them he don't emphasize them; we didn't visit them; we simply went down the main workings, down the main shaft.

Q. Who suggested the particular places from which the samples should be taken which you panned? A. We all suggested.

Q. Did Mr. Taylor suggest any place from which he wanted pannings made? A. Yes, he did.

Q. And were they panned?

A. Yes, they were.

Q. After the examination was made, as you have described, what, if anything, did Mr. Taylor say as to the result of it?

A. When we came to the surface at the collar of the shaft, he says to me, "I am more than pleased."

Q. Subsequent to this did you have any conversation with Mr. Taylor with reference to the people he expected to finance the property for him who wanted control; was that subject discussed between you and him?

A. He mentioned some of the people that he expected to get in the deal with him, I could not say that they expected to take control.

Q. The subject of their wanting control was not discussed, you mean? A. Not by Mr. Taylor.

Q. Was it by Mr. Thane? A. Yes.

Q. Where was that discussion had?

A. In New York.

Q. What did he say?

A. It was right after my arrival in New York.

(Testimony of C. W. Poole.)

I met Mr. Thane and I asked him how Mr. Taylor was getting along— [399—394]

Mr. THATCHER.—I object to conversations with Mr. Thane.

Mr. COOKE.—We submit he was a partner in this venture, he was an interested party, or was up to a few days ago, apparently, as shown by the testimony of Mr. Taylor and everybody who testified, while not an equal party, a party interested, and I think his representation would be competent.

Mr. THATCHER.—I think it might be as against Mr. Thane, were he claiming any interest.

The COURT.—It will be admitted then as against Mr. Thane.

WITNESS.—(Contg.) And he said he is not getting along very well; he said I could probably introduce him to people in the street who would be interested in this thing, but the trouble with Taylor is he wants other people to put up the money and himself to keep the control.

Mr. COOKE.—(Q.) Now you have already testified to this time, along the last of May in Lovelock, and Mr. Taylor and Mr. Jackson, and going out to the mine and going down in the mine with Mr. Jackson, and Mr. Taylor remaining up on the surface? A. Yes, he stayed on top.

Q. Do you know why he didn't go down the mine?

A. He said he wasn't interested, he had Bancroft's report, and he was going to stand on it.

Q. After you and Mr. Jackson had come out of

(Testimony of C. W. Poole.)

the mine and rejoined Mr. Taylor, you then returned to Lovelock? A. Yes.

Q. Just before starting for the mine, when you were at Lovelock, what if any conversation did you have with Mr. Taylor with reference to the Bancroft report not being favorable, do you recall whether that subject was discussed or not?

A. Yes, it was discussed.

Q. In the presence of whom and by whom?

A. It was discussed in the presence of Mr. Jackson by Mr. Taylor [400—395] and myself.

Q. What did Mr. Taylor say at that time about the report?

A. I met Mr. Taylor and Mr. Jackson on the street just before noon, probably half an hour before noon, that is the first I had seen of them in Lovelock; and Mr. Taylor's first words to me, as I recall it, were "Bancroft's report is unfavorable," and I said "What"? He said "Yes, his report is unfavorable." "Well," I said, "how do you reconcile that with the telegram that you sent me that it was favorable"? "Well," he says, "his first report was a preliminary estimate of tonnage, and he didn't have his assays, and the tonnage report was favorable"; "Well," I said, "how do you reconcile it with the telegram you sent to Thane"? Thane had given me a copy of that in which he reported 40,000 tons; I told him I didn't think Bancroft would make an exact statement of 40,000 tons; I don't recall any answer that Mr. Taylor ever made to that.

(Testimony of C. W. Poole.)

Q. In that conversation, or any conversation that you had with Mr. Taylor in the presence of Mr. Jackson, or otherwise, at this time in Lovelock, was anything said with regard to Morrin having lied to you? A. No.

Q. Did that subject come up as to the tonnage in the mine?

A. No; the question came up in that conversation about the report and I asked Mr. Taylor for the report, and he said he didn't have the report.

Q. That is the Bancroft report you are talking about?

A. Yes, his second report; and that is when he showed me the map on which these assays are plotted I have heretofore discussed; it was on the third level north, and between the fourth and fifth levels in the mine; and the question came up as to when Mr. Taylor had gotten these assays, and he told me that he had gotten them the same day, which conflicted with another letter which I had in my [401—396] pocket at that time, which had just been handed me, and led me to believe that he was going through with the deal.

Q. Is this when you were talking to him?

A. Yes; so then I flashed this letter on him, and I said "How do you reconcile this then"? and he didn't say anything; and I said, "Taylor, it occurs to me you are lying about these things; have you got the money to go through with this deal"? and then is when he told me he expected to put so much money in himself, and so much money his father

(Testimony of C. W. Poole.)

intended to put in, and so much Brown would put in, but that Mr. Brown and Mr. Brunton would probably visit the property.

Q. In conversation at any time, either before you got to the mine or after you returned from the mine, at Lovelock, did Mr. Taylor say anything to you with regard to communicating to your associates that the Bancroft report was unfavorable, as he stated to you?

A. In Lovelock when he first told me that the report was unfavorable, I said "Well, how do the rest of the men feel about this"? and he said, "I haven't told them, and I don't want you to tell them."

Q. The rest of what men?

A. That is my associates in the Nevada Humboldt. And I said, "What is the idea of not telling them"? "Well," he says "I want to go down to San Francisco and arrange a new deal, and if they knew that I am not going through with this deal, why, they probably won't go," and he says, "I think I can deal with them better in San Francisco than I can here."

Q. Is that all that was said upon that?

A. Well, he asked me to arrange an interview for him with J. T. Goodin of the First National Bank there, and he says "You owe Goodin money, don't you"? I said "Yes, we owe money," "Well," he says, [402—397] I want to see Goodin, and have him come to San Francisco, and if these fellows get obstreperous, he can put the screws to them."

(Testimony of C. W. Poole.)

Q. You are relating now what he said as nearly as you can recall it. A. Yes.

Q. You answered a question asked by Mr. Wheeler as to your not having been down in this mine from January 1, 1919, I think it was to April 2, 1919, is that correct; that you had not been down in the mine during that period?

A. From January the first, no, it was after Mr. Bancroft had been there and made his first examination.

Q. Then the fact is that you had not been down in the mine from the time Mr. Bancroft completed his first examination in January down to April 2d, when you were in Denver? A. Yes.

Q. Where were you engaged during that period?

A. I was superintendent of the Rochester Mines Company.

Q. You say you had not been down in the mine during this period. What about your giving your attention to the business by way of going to the property and looking over the surface, and occupying your time in that way?

A. I was not at the property.

Q. You were not at the property, either down in the mine or at the surface? A. No.

Q. In this conversation that you had with Mr. Taylor prior to the making of the contract of April 2d at Denver, did he say anything to you, or Mr. Murrish or Mr. Nenzel in your presence, as to why he wanted this data of development work?

A. Yes, he said he wanted it to give to Mr. Ban-

(Testimony of C. W. Poole.)

croft to induce Mr. Bancroft to make an examination; he told us previously he was trying to get Mr. Bancroft to do it, and he would not do it.

The COURT.—He has already testified to that once.

Mr. COOKE.—(Q.) With reference to this trip to San Francisco, [403—398] June 1st or 2d, along there, did you ever have any other business down in San Francisco at that time, aside from a business interview with Mr. Taylor?

A. The main business was to see our creditors.

Q. Had a meeting been called for the creditors in San Francisco about that time, do you know?

A. Well, it had not been called prior to going, but I told my associates what Mr. Taylor had said about putting the screws to us, and we discussed it pro and con, and decided we would have to—

Mr. THATCHER.—I move to strike out what he told his associates.

The COURT.—It may go out.

Mr. COOKE.—I don't care anything about that. (Q.) When was it arranged to have the creditors' meeting?

A. After we arrived in San Francisco, some time the early part of June.

Q. When was it finally decided between you and your associates to go down there and arrange with the creditors, how long before you started out?

A. I don't understand the question.

(The reporter reads the question.)

Mr. COOKE.—(Q.) Started out to San Francisco.

(Testimony of C. W. Poole.)

A. I think we started out on Saturday night, and it was Wednesday when we decided definitely to send out the notices.

Q. Calling your attention to the date about May 20, 1919, in New York City, do you recall having a conversation with Mr. Taylor there with reference to an advance, or possible advance by him on account of the concentrates, of some \$20,000, or thereabouts? A. Yes, he—

Mr. THATCHER.—Just a minute. You can answer that yes or no.

Mr. COOKE.—All right. (Q.) You say you do recall it? A. Yes.

Q. Go ahead and tell us what was said?

Mr. THATCHER.—Object as incompetent, irrelevant and immaterial and if it be an impeaching question no proper foundation has been [404—399] laid in either the statement to Mr. Taylor of the conversation, or the time, place, or persons present.

The COURT.—That is not necessary when you are attempting to impeach one of the parties, is it?

Mr. COOKE.—I think it is a declaration against interest, also.

The COURT.—I think I will allow the question.

A. Well, the substance of what was said was that Mr. Taylor said he could not make any more advances on the concentrates until he got Mr. Bancroft's report.

Mr. COOKE.—(Q.) Well, what report do you refer to? A. I refer to the—

(Testimony of C. W. Poole.)

Mr. THATCHER.—Object as calling for the conclusion of the witness; let him state the conversation.

The COURT.—He may state what Mr. Taylor said.

Mr. COOKE.—(Q.) Did Mr. Taylor say anything about what report he was expecting?

A. No, he didn't say what report he was expecting.

Q. Tell us just what he said, as nearly as you can recall.

A. As nearly as I can recall it, he said that he would not make any more advances of money on concentrates, until he got Mr. Bancroft's report.

Mr. COOKE.—I think that is all.

Cross-examination.

Mr. THATCHER.—(Q.) You are a mining engineer, Mr. Poole? A. Not by degree, no.

Q. You have been practicing mining engineering, as a matter of fact, for a number of years, have you not? A. Yes.

Q. Been acting as the manager or superintendent of mines, have you? A. I have.

Q. And for how long a period? [405—400]

A. Sixteen or seventeen years, nearly seventeen.

Q. And was that an active management of mining property? A. Was it an active management?

Q. Yes. A. Part of the time it was.

Q. Will you tell us of what mines you have acted as superintendent during that period?

A. Will I tell you?

(Testimony of C. W. Poole.)

Q. Yes. A. Yes.

Q. Go ahead and say what they were.

A. I acted as superintendent of the Oregon Idaho Gold Mines Company up in Lehigh County, Idaho.

Q. How long ago?

A. That was a short period, and early in my career, I can't recall that positively.

Q. What was the next property you had in charge?

A. The next property I had charge of was the Consolidated Murcur Gold Mines Company in Utah.

Q. About when was that?

A. That was right after the panic of 1907, and down to 1912, I think, four or five years in there.

Q. And what other properties; just give the names of them and approximately the length of time.

A. Well, the Rochester Mines, and the Rochester Combined Mines, the Seven Troughs Mining Company; I think that is the list of the properties that I had active charge of.

Q. The Seven Troughs property was controlled by Mr. Friedman was it not?

A. Not at the time I had charge of it.

Q. Was it controlled by him at any time that you were in charge?

A. It had been before I went there.

Q. And the Combined Rochester, was Mr. Friedman associated in that property? A. Yes.

Q. And was he an officer during the time you were in charge?

A. Well, I was consulting engineer of the prop-

(Testimony of C. W. Poole.)

erty, I was not superintendent. [406—401]

Q. You were consulting engineer? A. Yes.

Q. And the Rochester Mines Company, what position did you hold with that?

A. I was superintendent there, general superintendent.

Q. And in your duties as general superintendent, did you also act as consulting engineer, or engineer in charge? A. Yes.

Q. At Rochester? A. Yes.

Q. You didn't have any other engineer during that time?

A. I had another engineer under me.

Q. Under you. Coming to the Nevada Humboldt, what relation did you have with that company at that time, or at any time? A. At any time?

Q. Yes.

A. My first relation with the Nevada Humboldt was strictly that of a business relation; I was interested in the venture.

Q. You owned stock in it, did you? A. Yes.

Q. As a matter of fact, the Nevada Humboldt was rather a close corporation, was it not? A. Yes.

Q. And consisted generally of those who were associated closely to Mr. Friedman, did it not?

A. Yes.

Q. What other relation did you have with the Nevada Humboldt? A. What other relation?

Q. Yes.

A. Well, up until January the 31st, 1918, by virtue of a contract that I had with Mr. Friedman, I

(Testimony of C. W. Poole.)

acted as consulting engineer for that property, because my contract called for my acting as consulting engineer of all properties of which he had control, and he did have control of the—

Q. (Intg.) Have you that contract?

A. A copy of it.

Q. Is it in writing? A. Yes.

Q. Will you give me a copy of it before to-morrow morning?

Mr. COOKE.—You can have it now if you want it.

Mr. THATCHER.—Give it to me now. (Paper handed to counsel for plaintiff.) [407—402]

Q. Now after the first of January what relation did you have to the Nevada Humboldt Tungsten property? A. That of a stockholder.

Q. Nothing else? A. Nothing else.

Q. Did you have anything to do, or did you lay out any of the plans of development in the property?

A. No, Mr. Bancroft laid those out.

Q. Well, between the time of the first of January and the time that Mr. Bancroft made his report, who laid out the plans?

A. Well, from the first of January until he made his report I never went to the property.

A. After Mr. Bancroft went on there he laid out the plans? A. Yes.

Q. Did you examine that plan of development?

A. Yes, I did.

Q. Did you state that was a proper plan of development; did you approve it, in other words?

(Testimony of C. W. Poole.)

A. I told Mr. Bancroft I thought that was a satisfactory plan.

Q. You thought it was a satisfactory plan?

A. Yes.

Q. Did you wire Mr. Taylor, telling him that you had seen Mr. Bancroft's plan of development, or heard of it, and that you approved it? A. Yes.

Q. Did you state to any other members, directors, or officers of the company that you approved Mr. Bancroft's method of development?

A. I don't know that I did; I probably did, but I could not say certainly.

Q. Did you discuss Mr. Bancroft's plan with any of the directors or officers of the company?

A. Yes, I think I did.

Q. Did you discuss it with Mr. Morrin?

A. I discussed it in a great detail with Mr. Morrin, yes.

Q. You did? A. Yes.

Q. How great detail, went over it very carefully, did you?

A. Yes. Well, the report which I had in mind has never been [408—403] brought in evidence here; it is a report made out by Mr. Morrin and Mr. Bancroft, in which they attempted to show me that by producing scheelite strictly for development work they would not very much increase the cost per unit; it is cheaper, as all mining engineers know, to stope rather than drift; raise and sink, and Mr. Bancroft's plan contemplated almost exclusively, drifting and raising, and no stoping, and must

(Testimony of C. W. Poole.)

necessarily raise the cost of producing scheelite; he knew I was interested in producing scheelite as cheaply as possible to liquidate our debts.

Q. Who first told you of Mr. Bancroft's plan of development?

A. I think Mr. Bancroft called me up from the Nevada Humboldt mine and I was in Rochester at the time.

Q. Did Mr. Morrin ever call it to your attention?

A. No, he did not call it to my attention; he was there when I arrived at the mine, and Mr. Bancroft and I and Mr. Morrin discussed it all at the same time.

Q. All at the same time? A. Yes.

Q. Did you at any time instruct Mr. Morrin what he should do on the property, or how it should be developed? A. Did I instruct him?

Q. Yes. A. I don't know that I did.

Q. Didn't you as a matter of fact, generally give Mr. Morrin instructions as to how the development work should be carried out?

A. I certainly did not, never after the first of January.

Q. Never after the first of January?

A. No, that was not my business after the first of January.

Q. How many times did you visit the mine after the first of January?

Mr. COOKE.—During what period?

Mr. THATCHER.—After the first of January, 1919, up to the first of June, 1919. [409—404]

(Testimony of C. W. Poole.)

A. Here is the way I recall; my recollection is when we came from San Francisco, that I went to the property with Mr. Bancroft purely out of courtesy, that he and I had no discussions, and I didn't show him anything at that time, because he had already been over the property; however, I am doubtful of that point; I certainly went there a few days later, but my next recollection of having been in the mine was April the 9th; my next recollection is going down the mine with Mr. Taylor at the time of his visit; and my next recollection is going down with Mr. Jackson.

Q. Did you receive a telegram from Mr. Taylor to meet him and go to the mine with him?

A. Did I?

Q. Yes.

A. No, I didn't; Mr. Taylor is not in the habit of corresponding with me.

Q. Well, how did you know that Mr. Taylor was coming? Did Mr. Nenzel, Mr. Friedman, or any of them, inform you that he was coming out to look at the property.

A. Some of them must have informed me.

Mr. COOKE.—I move to strike that as not responsive.

Mr. THATCHER.—I want to know how.

Mr. COOKE.—I don't object to the question, but to the answer, argumentative, and must be.

Mr. THATCHER.—(Q.) Don't you recollect as a fact that either Mr. Friedman or Mr. Nenzel told

(Testimony of C. W. Poole.)

you to go out to the mine with Mr. Taylor, that Mr. Taylor was coming, and to go out with him?

A. My best recollection is that at the time Mr. Taylor came there I was in Tonopah, and I received a telegram from some one, I can't be positive who.

Q. Have you that telegram? A. No, I haven't.

Q. Your best recollection is you received a telegram from some one, either Mr. Murrish, Mr. Nenzel, or Mr. Friedman, informing you that Mr. Taylor was coming to visit the mine, and asking you to [410—405] return home, is that correct?

A. Yes, that is my best recollection.

Q. Your statement is, then, that you had only visited the mine three times from the first of January until the middle of April, is that correct?

A. I say that I—

Q. (Intg.) Give us the exact dates from the first of January, or the 16th of January, to the first of June of all of the times that you visited the mine?

A. All right. I may have gone direct to the property with Mr. Bancroft after the January 16th contract was signed, I am not certain; I am certain that I was at the mine a few days subsequent, that I am positive of; I am positive that I was not in that mine again until April 9th; I am positive that I was not in it from April the 9th until the latter part of April, when Mr. Taylor came there; and then I certainly was not in it from that on until I went down with Mr. Jackson.

Q. While in New York what were you doing?

(Testimony of C. W. Poole.)

A. What was I doing?

Q. Yes.

A. My prime object was to see Mr. Taylor and Mr. Thane.

Q. What else were you doing while you were in New York, or in the East?

A. While I was East I went to Washington.

Q. What were you doing in Washington?

A. My idea was to—

Q. What were you doing in Washington, I don't care what your idea was?

A. I was finding out how you presented a claim to the War Minerals Relief Commission.

Q. What kind of a claim?

A. What kind of a claim?

Q. Yes.

A. A claim for relief under the War Minerals Relief bill.

Q. Tungsten mine, is that what you were talking about?

Mr. COOKE.—Objected to as not cross-examination.

The COURT.—It seems to me that objection is good. [411—406]

Mr. THATCHER.—(Q.) Weren't you in Washington all of this time for the purpose of presenting a claim from the Nevada Humboldt Tungsten Company to the War Relief Board or War Metals Relief Board? A. No, I was not.

Mr. COOKE.—Objected to as not cross-examination.

(Testimony of C. W. Poole.)

The COURT.—I don't think it is cross-examination, Mr. Thatcher. It may go out.

Mr. THATCHER.—(Q.) Did you not in fact, while you were there, present on behalf of the Nevada Humboldt Tungsten Mines Company its claim against the Government for relief? A. I did not.

Mr. COOKE.—Objected as not cross-examination, incompetent and irrelevant from any aspect.

Mr. THATCHER.—Don't answer until counsel has an opportunity to object. My reason for presenting this, if your Honor please, is to show his relation to the company, which has been denied, and which he has denied here on the witness stand; and he has testified that he was not connected with the company except as a stockholder. I don't know just exactly what his relation was, but it seems to me that he had some relation.

Mr. COOKE.—I submit this would not show any particular relation.

The COURT.—Well, granting that he answers the questions in the affirmative, which you have propounded, would that help you as to conditions in Lovelock, and his knowledge of the mine, and that he was acquainted with the underground working?

Mr. THATCHER.—It seems to me that it would, if the Court please, because I will show by further questions that a man in order to make a presentation to the Government, or War Relief Board, would have to be familiar with a certain amount of detail; but I will let that line of examination go

(Testimony of C. W. Poole.)

for the time being, and ask leave of the Court to ask the questions a little later. [412—407]

Q. You went to Denver and arrived there some time about the 30th of March, Mr. Poole?

A. Yes, the 30th of March.

Q. My recollection is that you stated that you went there in response to the correspondence had with Mr. Taylor, is that correct?

A. No, I hadn't had any correspondence with Mr. Taylor.

Q. No, you hadn't had any, but you stated that you went on there in response to some correspondence that Mr. Taylor had had with Mr. Murrish, Mr. Nenzel and Mr. Friedman?

A. Yes, they told me he wanted us back there.

Q. You went over the correspondence that had taken place between the parties, did you, before they left? A. No.

Q. Did they tell you what was in it?

A. Told me in substance what was in it.

Q. What did they tell you of the purpose or object?

A. They told me Mr. Taylor wanted a new deal on some basis of paying the debts and giving stock.

Q. Did you go over any of the correspondence at all, read any of it?

A. I don't recollect that I did; I don't think I did.

Q. Would you say that you did not?

A. Yes, I would say that I did not.

Q. Now you had a power of attorney when you went on there, did you not? A. Yes.

(Testimony of C. W. Poole.)

Q. And whose power of attorney was that?

A. John Huntington.

Q. Did you have any other? A. No.

Q. How did you come to get that power of attorney?

Mr. COOKE.—Objected to as incompetent, irrelevant and immaterial; it makes no difference how he got it, if he got it.

Mr. WHEELER.—Object to it also on the ground it is not cross-examination.

Mr. THATCHER.—It is cross-examination, if the Court please, or it will be. [413—408]

The COURT.—What is the purpose of it?

Mr. THATCHER.—I don't like to state.

The COURT.—Go on and ask your questions, and if they are not all right they will be stricken out.

Mr. THATCHER.—(Q.) How did you come to get this power of attorney?

A. He gave it to me.

Q. Did you go around and ask him for it?

A. I did not.

Q. Do you know who drew that power of attorney? A. I think Mr. Murrish drew it.

Q. You think Mr. Murrish drew it?

A. I think so.

Q. Did you take it around to Mr. Huntington to have him sign it, or did Mr. Murrish do that?

A. I could not say, Mr. Huntington gave it to me.

Q. Mr. Huntington brought it to you? A. Yes.

(Testimony of C. W. Poole.)

Q. Did you have before you left for Denver—

A. (Intg.) Did I have it?

Q. Wait just a minute. Before you left for Denver did you, Mr. Murrish, Mr. Huntington, Mr. Nenzel, Mr. Friedman, and the other stockholders have a conference with reference to going to Denver on this matter; did you have any meeting for that purpose? A. No.

Q. Not that you were at? A. No.

Q. Mr. Huntington just walked up and handed you this power of attorney, and you walked on to Denver, or took the train to Denver; is that correct? A. No.

Q. What was the fact?

A. Mr. Huntington knew as well as I did that there was going to be a conference in Denver; he got his information that there was going to be from me.

Q. From you?

A. Yes; I sent Mr. Huntington out to the mine to make those surveys which appear on this plat, and when Mr. Huntington [414—409] came back he executed that power of attorney; he came back to Lovelock from his survey and while there executed that power of attorney and handed it to me.

Mr. WHEELER.—(Q.) This map Exhibit “Y”?

A. I mean our big map sir.

Mr. WHEELER.—That is Exhibit “Y.”

Mr. THATCHER.—(Q.) Do you know who drew the other powers of attorney that were signed?

(Testimony of C. W. Poole.)

A. I think Mr. Murrish did, he was accustomed to doing all that work.

Q. He did all that work of that kind for the crowd, is that right?

A. As long as I had anything to do with it.

Q. Mr. Murrish is an attorney, is he?

A. Is he an attorney?

Q. Yes.

A. Yes, I think he is, I am sure he is.

Q. Who paid the expenses of your trips to Denver?

Mr. COOKE.—If that is all the testimony on the powers of attorney, I move to strike it out as incompetent, irrelevant and immaterial, and not cross-examination.

The COURT.—Is all your purpose now disclosed?

Mr. THATCHER.—As far as that part is concerned it is if the Court please.

The COURT.—I do not see that that is cross-examination.

Mr. THATCHER.—Well I want to show why he testified that he went on there in response to certain correspondence which had taken place between himself and Mr. Taylor; I want to show what that correspondence was, how much he knew of it, and how much his principal, Mr. Huntington, knew of it.

The COURT.—Then that portion of his testimony may remain, in which he tells of seeing or knowing what the correspondence was; but that in reference to the powers of attorney I don't think is cross-examination. [415—410]

(Testimony of C. W. Poole.)

Mr. THATCHER.—May that portion also remain in which he states that Mr. Huntington knew what the situation was, and gave him the power of attorney?

The COURT.—I will let that stand, and the remainder will go out.

Mr. THATCHER.—I would like to have this marked for identification, if the Court please; this is the contract between Mr. Friedman and C. W. Poole.

(The contract is marked Plaintiff's Exhibit 48 for identification.)

Mr. THATCHER.—If the Court please, I am just about at a stage to commence a new portion of the cross-examination, and if there is no objection I would like to take a recess at this time.

(At 4:20 o'clock P. M. Court adjourns until tomorrow, September 21st, at 10 o'clock A. M.)

Tuesday, September 21st, 1920.

Court convened, 10 o'clock A. M.

Mr. WHEELER.—Mr. Thatcher, we called yesterday for certain papers and documents; have any of them been found?

Mr. THATCHER.—I have been looking for them, I think we have some; the others we have telegraphed to see if we can locate them.

Cross-examination of Mr. C. W. POOLE Resumed.

Mr. THATCHER.—(Q.) Mr. Poole, I understand you to say that you reviewed the correspondence, and went to Denver as a result of the cor-

(Testimony of C. W. Poole.)

respondence which took place between Mr. Taylor, Mr. Friedman, Mr. Nenzel and others?

A. Not that I reviewed the correspondence.

Q. Did you go over any of the correspondence?

A. I saw some of the correspondence.

Q. And do you recollect particularly that Mr. Taylor in a letter [416—411] to Mr. Friedman, which is here marked Plaintiff's Exhibit 12, suggested that if Mr. Friedman could not come on that he made the following suggestion; "if you cannot do this, would your stockholders be willing to have Nenzel, Murrish and Poole appointed as a joint committee to represent all of them in readjusting the option, as, I believe that after several days 'wrangling,' we could agree on some mutually satisfactory plan." Do you recollect that?

A. I don't recall that letter, no.

Q. Just take a look at it and see if you recollect. (Hands letter to witness.)

A. I don't recall having seen that letter.

Q. You don't recall having seen that letter?

A. No, I don't.

Q. Did you and Mr. Nenzel and Mr. Friedman, or any of you, discuss the question of sending a stockholders' committee or stockholders' pool on to see Mr. Taylor, to readjust the option?

A. No, we didn't discuss the matter at all.

Q. You didn't; how did you come to go to Denver?

A. Because Mr. Friedman told me Mr. Taylor wanted to arrange a new deal.

(Testimony of C. W. Poole.)

Q. Mr. Friedman did tell you that? A. Yes.

Q. Did anyone else tell you that?

A. I think Mr. Nenzel mentioned that fact, too.

Q. Did Mr. Murrish mention it also?

A. Not that I recall.

Q. At any rate, you did all go together?

A. Yes.

Q. And you did understand at that time that you were going there to readjust the option contract?

A. Yes.

Q. And you were going there as a stockholders' committee or pool, is that correct?

A. I don't understand what you mean by stockholders' committee or pool.

Q. Well, you went there to represent the balance of the stockholders [417—412] and yourself, did you not?

A. I went there to represent myself.

Q. And you also represented Mr. Huntington, too, did you not? A. Yes.

Q. And you arrived in Denver on what date?

A. Sunday about noon.

Q. Sunday about noon; and you left there on what date, Wednesday?

A. Wednesday, late in the afternoon, as I recall.

Q. My understanding is that during the first three days that you were there, or two days, on Sunday and Monday and Tuesday, you didn't discuss with Mr. Taylor any question of tonnages?

A. No.

(Testimony of C. W. Poole.)

Q. And you didn't discuss with Mr. Taylor during any part of that time the question of percentages or values of ore? A. Yes.

Q. When?

A. Sunday when I gave him the map, when I first arrived there.

Q. Then when you first arrived there on Sunday, you gave him the map, is that correct? A. Yes.

Q. And you did discuss with him at that time percentages of ore?

A. I presented that map, and explained every detail on that map when I presented it.

Q. When you refer to that map you mean Defendant's Exhibit "Y," your mine map, is that correct? A. Yes, that is the map.

Q. And you gave that to him on Sunday; and what percentages did you tell him, or what ores or percentages did you tell him were there at that time?

A. I told him that I hadn't had occasion to visit the mine, and that I had sent Mr. Huntington out there, and Mr. Huntington had brought that map up to date; and at the time that he had brought it up to date he had put certain estimates of values on there, Mr. Morrin and he, and that—

Q. Now— [418—413]

Mr. WHEELER.—Let the witness finish the answer.

Mr. THATCHER.—Go ahead. Did I interrupt you, were you through?

(Testimony of C. W. Poole.)

A. No, I wasn't through.

Q. Go on then.

A. And that he should not rely on those facts; I said, "I will vouch for these distances, because Mr. Huntington is an accurate surveyor, but as to these percentages, you must realize they are merely estimates, and not values."

Q. Then I understand that on Sunday you gave him the map, called his attention to these percentages and also to the distances which the works had been extended, as shown by Mr. Huntington?

A. Not the distances in feet, but merely that the map was correct.

Q. That the map was correct? A. Yes.

Q. Did you say anything to him with reference to distances at that time; did you use the word distances? A. No, I think not.

Q. On Sunday I am talking about?

A. No, I think not.

Q. Didn't you testify just a moment ago that you called his attention to the percentages on the map? A. Yes.

Q. And told him he should not rely upon them, but that he could safely rely on the distances because they were made by Mr. Huntington, who was a competent surveyor; didn't you just so testify?

A. I did. I would like to say I mean distances as graphically represented on the map, and not as figures.

Q. Not as figures, but the graphic representa-

(Testimony of C. W. Poole.)

tion of distances on there; and you told him on Sunday that he could rely on that, didn't you?

A. I certainly did.

Q. Now on Monday did you have any discussion with Mr. Taylor as to tonnages? A. I did not.

Q. Nothing was said about tonnages in the mine?

A. No.

Q. Or the amount of ore blocked out, developed, in sight or indicated? A. No.

Q. Was anything said on Sunday as to the amount of ore which was [419—414] blocked out, in sight, developed or indicated? A. No.

Q. Then as I understand it, neither on Sunday nor Monday was there any statement made as to the tonnage which was in the mine, indicated or otherwise? A. No.

Q. Now on Monday did you have any further discussion with Mr. Taylor as to percentages, or as to values of ore in the mine?

A. Not that I recall.

Q. On Tuesday did you have any discussion with Mr. Taylor as to tonnages in the mine? A. No.

Q. Was anything said by either you or Mr. Taylor on Tuesday as to whether or not there was any particular tonnage in sight in that mine?

A. No, there was not; Mr. Taylor—

Q. You can answer the question yes or no.

A. No.

Q. Then I understand you that on Tuesday there was no reference made to tonnages or to ore blocked out, developed, indicated or in sight?

(Testimony of C. W. Poole.)

A. Yes.

Q. Then there was no discussion of any kind whatsoever on Tuesday with reference to tonnages, is that right?

A. Yes, there was a discussion with reference to tonnages.

Q. On Tuesday? A. Certainly.

Q. What was the discussion on Tuesday with reference to tonnages?

A. Hypothetical tonnages that are in that prospectus.

Q. Tell what was said on Tuesday with reference to tonnages, between you and Mr. Taylor?

A. Mr. Taylor amplified that exhibit there.

Q. What exhibit?

A. I don't know the number of it.

Mr. WHEELER.—It is Defendant's Exhibit "B."

Mr. THATCHER.—(Q.) On Tuesday he amplified what?

A. He explained that prospectus to us.

Q. That prospectus, you mean Exhibit "B"?

A. I mean that, yes, sir. [420—415]

Q. That is what you mean? (Hands paper to witness.) A. Yes, sir.

Q. But at that time you didn't tell Mr. Taylor, on Tuesday, anything about any tonnages that were in the mine? A. I did not.

Q. You made no mention of tonnage at any time?

A. No.

Q. Then the only discussion or statement that

(Testimony of C. W. Poole.)

was made with reference to tonnages, is that which appears on Exhibit "B"; is that correct?

A. That is my recollection of it, yes, sir.

Q. And that was made by Mr. Taylor?

A. Yes.

Q. Not by you? A. No.

Q. Mr. Nenzel was present all of that time, was he, on Tuesday? A. Yes.

Q. Mr. Nenzel and Mr. Murrish were present at all times, at all meetings on Sunday, Monday and Tuesday; is that correct?

A. On Sunday, yes; on Monday, yes, except that Mr. Murrish was not there Monday afternoon; that has not been brought out in the testimony.

Q. Oh, Mr. Murrish was not there on Monday afternoon, is that right?

A. Yes, that is right; not all the time.

Q. He wasn't there all the time?

A. He came in late in the afternoon.

Q. Well, were you and Mr. Nenzel together all the time at all conversations with Mr. Taylor, to the best of your recollection?

A. Yes, I think so.

Q. That is your best recollection?

A. Yes, that is my best recollection.

Q. And that Mr. Murrish was out some of the time? A. Yes.

Q. Now on Wednesday when was the first conversation between yourself and Mr. Taylor with reference to tonnages?

(Testimony of C. W. Poole.)

A. It was after he and Mr. Murrish had arrived at some agreement [421—416] on the contract; that is, about the final drawing up of it; whether the contract had been dictated or not—

Q. (Intg.) And who was present then?

A. Who was present then?

Q. Yes. A. Mr. Nenzel.

Q. Yourself and Mr. Nenzel? A. Yes.

Q. Mr. Murrish was in the other room finishing up the contract?

A. He was either in the other room, or had left the building, I can't recall.

Q. Then my understanding is that there was never any discussion or statement by you with reference to tonnages, except Mr. Taylor's Exhibit "B," until after you had agreed upon the terms of the contract, and it was being dictated and prepared by Mr. Murrish; is that right?

A. The tonnages shown in Mr. Bancroft's report may have been discussed on Sunday, I can't say as to that.

Mr. THATCHER.—I move to strike it out as not responsive.

The COURT.—It may go out. Read the question.

(The reporter reads the question.)

The COURT.—That calls for a categorical answer.

Mr. THATCHER.—Read the question again.

(The reporter reads the question.)

Mr. COOKE.—I object to the question. Counsel

(Testimony of C. W. Poole.)

asks the witness as to what counsel's understanding is.

The COURT.—You may strike the word “understand” out.

(The reporter reads the question.)

WITNESS.—I don't understand what Taylor's Exhibit “B” means.

Mr. THATCHER.—All right, I will reframe the question; let me take it this way; (Q.) Is it a fact that there never was any discussion or statement by you with reference to tonnage in that mine until after you had agreed upon the terms of the contract, and it was in process of being dictated and typewritten? A. Yes. [422—417]

Q. Then Mr. Taylor never asked you, and you never stated to him any amount of tonnage in that mine at any time until after you had agreed upon the terms of the contract, and it was being actually written; is that true? A. Yes.

Q. At that time who had your maps, did you have them? A. At that time, you mean?

Q. Yes.

A. They were in Mr. Taylor's office, down there.

Q. They were in Mr. Taylor's office at that time?

A. Yes.

Q. How many maps did you have?

A. Six or seven.

Q. Where are they? A. They are here.

Mr. THATCHER.—Will you produce them for our inspection.

(The maps are handed to counsel for plaintiff.)

(Testimony of C. W. Poole.)

Q. These other maps which your counsel has handed me are maps which you took on at that time? A. Yes.

Q. I call your attention again to Defendant's Exhibit "Y," and ask you if that is a map you had at that time? A. It is.

Q. And is that the map which you said you used in the conversations and statements with Mr. Taylor, when you were fixing up or putting down upon the photostat map various data and details which you testified to yesterday?

A. That is the map with the change that I specified, yes.

Q. Will you state what pencil marks were not on this map at that time; read them?

A. 9250. 4200. 2048. 1080. 4860. That is all I see that weren't on there.

Q. They were not on there at that time?

A. No.

Q. Then I understand you to say that in the left-hand corner of the map the words "cut" and "ore." "Ore in cut, 2%," was that on there? A. Yes.

Q. And in the same block, which corresponds to block "M" in Mr. [423—418] Bancroft's report, Exhibit 15, there are also the figures "Average width 5 feet ore three-quarters one per cent"; was that there when you took this map to Denver?

A. Yes, that was there.

Q. Now calling your attention to the right-hand side of the map, and what would correspond with block "N," was there on that map at the time you

(Testimony of C. W. Poole.)

took it to Denver, "Average width 8 feet, two per cent ore"? A. Yes.

Q. Calling your attention to the words just used, "Average width 8 feet, two per cent ore," what is that supposed to represent?

A. What was it supposed to represent?

Q. Yes.

A. It is supposed to represent Mr. Morrin's estimate which he gave to Mr. Huntington.

Q. Well, using the figures, does not that mean that the extension of that drift which runs under block "N," would have an average width of 8 feet, and run two per cent in tungsten; is not that what it is supposed to mean? A. It could mean that.

Q. Well, isn't that what it is intended to mean?

A. No, it is not what it is intended to mean.

Q. What does it mean?

A. It means Huntington put that on there as his estimate.

Q. His estimate of what?

A. His estimate of what he thought was down there; he was making it in the office.

Q. His estimate of what he thought was down there? A. Yes.

Q. What workings would that refer to?

A. Refer to these workings here represented.

Q. And would it refer to the extension of that drift under block "N"? A. Would it?

Q. Yes, did it refer to it?

A. Well, I can't say positively, because there may have been some stoping area about that.

(Testimony of C. W. Poole.)

Q. Do you know whether there was any stoping area above that? [424—419]

A. I don't think there was, but there may have been.

Q. Don't you know there was no stoping area above that level in block "N," up to date?

A. No, I don't.

Q. You don't? A. No.

Q. Calling your attention to the words "Average width 5 feet ore three-quarters of one per cent," what does that mean—which is in what would correspond with block "M" in the Bancroft report, Exhibit 15. A. Well, it means just what it says.

Q. Can you explain it for the benefit of the record?

A. I would say that that was meant to mean that the average width of that drift there was five feet, and that the estimated value of it was three-quarters of one per cent.

Q. That is what I wanted to know.

Mr. WHEELER.—(Q.) Three-quarters of one per cent? A. Yes.

Mr. THATCHER.—(Q.) Now coming down—these levels are not numbered on this map, are they? A. No.

Mr. THATCHER.—Do you object to these being numbered for the purpose of identification?

Mr. WHEELER.—Not at all.

Mr. THATCHER.—(Q.) Mr. Poole, will you now use a blue pencil and mark this block in the right-hand corner of the map "N"?

(Testimony of C. W. Poole.)

A. Yes. (Witness marks on the map as requested.)

Q. And mark the block beyond the granite dike, "M."

(Witness marks the point on the map.)

Q. Will you also number the levels in the mine as numbered by the Bancroft map. Take the shaft level—the level from the shaft; just number it right in the middle of the shaft; that will be 1, 2, 3.

(The witness marks the numbers of the levels on the map.)

Q. Mr. Poole, calling your attention to exhibit "Y," and Plaintiff's Exhibit 15, particularly to plate 5, why do they appear different, appear to be reversed? [425—420]

A. Well, this is assumed as looking north; Exhibit "Y" is assumed as looking northwest, and this is assumed as looking southwest.

Q. In other words, one is a footwall plate and the other is a hanging-wall plate; is that correct?

A. Yes.

Q. Now coming down to level number one, shaft level number one, you have already called our attention to the marks that were on the map at that time? A. Yes.

Q. In block "M," just out from level number 1, from the shaft, are the figures 9250, when were they put on? A. I don't know.

Q. You don't know? A. No, I do not.

(Testimony of C. W. Poole.)

Q. You haven't any idea as to when those figures 9250 were put on?

A. I can make a guess; I think they were put on on Wednesday in Denver; I am not positive because they are not my figures.

Q. Not your figures? A. No.

Mr. WHEELER.—(Q.) Were they or were they not on there when you took that map back to Denver?

A. They were not.

Mr. THATCHER.—(Q.) They were put on afterward, were they?

A. Yes.

Q. And this 4200 in block "N," when was that put on?

A. Well, it was put on after I took this map to Denver.

Q. It was after you got to Denver, it was not on there when you left Lovelock? A. No.

Q. It grew on some time between the time you left Lovelock and the time you got back?

A. I don't think it grew on there.

Q. Well, it got on there? A. Yes.

Q. Now calling your attention to level number two—is this south? A. Yes, that is south.

Q. Calling your attention to level number two south, beyond the fault plane, do you see any figures on there in pencil? A. Yes, I do. [426—421]

Q. What are they?

A. "One-half of one per cent low grade ore."

Q. Who put that on there?

(Testimony of C. W. Poole.)

A. John Huntington.

Q. Was it on there when you went to Denver?

A. It was.

Q. And when Mr. Taylor saw the map?

A. Yes.

Q. Calling your attention to level number two north, just above the drift, are there any figures there? A. Yes.

Q. Will you read them?

A. "Width 5 feet, 15 feet ore, one and one-half per cent."

Q. Who put those on there?

A. Mr. Huntington.

Q. Were they on there when you got to Denver?

A. They were.

Q. And they were shown to Mr. Taylor?

A. They were.

Q. Calling your attention to level number 3, are there any figures or letters on number three north?

A. Yes.

Q. What are they?

A. "Width 10 feet, one and one-half per cent ore."

Q. Width ten and one-half feet, one and one-half per cent ore?

A. Width 10 feet, one and one-half per cent ore.

Q. What does width 10 feet, one and one-half per cent ore mean? A. Mean with reference to this?

Q. Yes, with reference to number three drift? What does it mean so far as you know?

(Testimony of C. W. Poole.)

A. I would take that to mean the average width, myself, but it does not say it.

Q. Well, would not you take that to mean that it meant average width for 10 feet of one and one-half per cent tungsten ore; don't you so understand it?

A. No, I don't so understand it in face of these averages up here.

Q. Look at this and tell me what you understand by that?

A. I would say that represents—there must be some place on that level where there is ten feet of ore.

Q. Calling your attention to the south drift on the number three. [427—422]

A. Width 5 feet, one and one-half per cent.

Q. Now coming down to the next level, level number four, what figures do you find both north and south?

A. "North, width 8 feet, one and one-half per cent"; on the south drift, "width ten feet, two per cent."

Q. Were those widths and percentages on levels number 1, 2, 3, and 4, when you took this map to Denver? A. They were.

Q. And exhibited it to Mr. Taylor?

A. They were.

Q. There appears to be an extension of the number 3, both north and south from the shaft; when were those put on there? A. I don't know.

Q. Were they on there when you went to Denver?

(Testimony of C. W. Poole.)

A. No, they were not. The map was inked, all except this here, why that was not inked, I don't know.

Mr. WHEELER.—When you say “this” the record won't show what you mean.

A. Exhibit “Y.”

Q. You say “all except this here,” to what were you pointing?

A. That is the drift under block “N”; these extensions have been put on since.

Mr. COOKE.—You had better identify what extension you mean.

A. All other lead pencil extensions except the one under block “N.”

Mr. WHEELER.—(Q.) You say have been put on since the trip to Denver; is that right?

A. Yes, they have been put on since the trip to Denver.

Mr. THATCHER.—(Q.) Now were there any other lines on that map, lines or figures, at the time you took it to Denver?

A. No.

Q. Were there any others put on in Denver, except those you have mentioned? A. Yes.

Q. What were they?

A. Well, this construction line that goes from here up to here (indicating).

Mr. WHEELER.—(Q.) That is, from the fourth level to the first [428—423] level diagonally on the right side of the shaft?

(Testimony of C. W. Poole.)

A. Yes.

Mr. THATCHER.—(Q.) Now is that line distinct at this time, easily seen?

Mr. WHEELER.—I submit that is for the observation of the Court.

WITNESS.—I can see it easily; here it is. (Indicating on map.)

Mr. THATCHER.—(Q.) Now is there any other line on it?

A. There are several lines on it.

Q. Isn't it a fact that there is a line commencing below the fourth level in the shaft? A. Yes.

Q. And running diagonally up past the number 2, up to the end of the number 2 level?

A. Which line do you refer to?

Q. Right there. (Indicating on map.)

A. Well, that does not go from the bottom of the shaft.

Q. Below the bottom of the shaft?

A. No, it starts from the extension of the fourth level north.

Q. All right. Commencing at the end of the drift on the fourth level north, is not there a line, which runs up to the extension of the number 3 north, and thence up to the number 2 north?

A. Yes.

Q. And is not that line also extended then vertically to the number one north? A. Yes.

Q. And that can be seen on the map, can it not?

A. It certainly can.

(Testimony of C. W. Poole.)

Mr. THATCHER.—Can your Honor see that?

The COURT.—No.

WITNESS.—They are simply construction lines, and they are put on real faintly in the first place so as not to mar the map.

Mr. THATCHER.—(Q.) Will you just slightly below those lines trace them out with a blue lead pencil which I hand you, just [429—424] enough below them so as to keep the original line intact on that map; take all of those lines on the south.

Mr. COOKE.—I take it that is simply for the purpose of making it more easily seen?

Mr. THATCHER.—Easily seen and referred to.

WITNESS.—You want me to trace those lines?

Mr. WHEELER.—Without obliterating the original lines.

(Witness traces lines on the map as requested.)

Mr. THATCHER.—(Q.) Below the fourth level, running from the shaft up to the number 4 north, there is a line which appears to have been erased, is there not?

A. Yes.

Q. Trace that lightly, or just below it, with blue pencil.

(The witness traces the line on the map as requested.)

Q. Now coming to the south side of the map, what lines are shown?

(The witness traces the lines on the map with blue pencil.)

(Testimony of C. W. Poole.)

WITNESS.—Here are two pencil lines.

Q. Those two pencil lines clearly indicated are nothing more or less than the extension of the fault plane? A. Yes.

Q. Now you have indicated by using the blue pencil, lines which can be traced upon that map; do you know when those lines were put on there?

A. Do I know?

Q. Yes. A. No, I don't.

Q. Were they on there when you were in Denver?

A. Well, these lines certainly were not.

Mr. WHEELER.—These lines are what?

Mr. THATCHER.—(Q.) When you say this line, do you mean one from the number 2, end of the number 2 north drift, downward to the end of the number 4 drift?

A. Well, downward to the end of the number 3, thence downward to the end of the number 4. [430—425]

Q. That was not on the map when you went to Denver? A. No.

Q. Do you know when it got there?

A. Well, I don't know positively; I have my opinion.

Q. Well, I know; did you put it on there?

A. No, I did not.

Q. You didn't put it on there? A. No.

Q. Do you think Mr. Nenzel put it on there?

A. No.

Q. Do you think Mr. Murrish put it on there?

(Testimony of C. W. Poole.)

A. No.

Q. And you know that you did not? A. I do.

Q. Calling your attention to Plaintiff's Exhibit 15, and to plate number 5, I call your attention to a line, a pencil line running from slightly below the fourth level to the extension of the number 4 north, thence diagonally to the number 2 north, or an extension thereof; do you observe that line?

A. Yes.

Q. How does that line compare with the blue line which you have just testified to be upon Exhibit "Y," which runs from the number 2 north, thence downward to the extension of the number 3, and thence to the end of the number 4?

A. They don't compare.

Q. Isn't it almost and doesn't it take in almost exactly the same area?

A. In no sense does it from an engineering standpoint; it runs from the bottom of the shaft, and the other is an extension from the number 4 level, and a later date.

Q. Is not there also on your Exhibit "Y" a line which runs from a point about half way?

A. It starts from a point half way, and runs downward, yes.

Q. Is not there a line about forty feet, commencing at a point about forty feet north in the drift on the number 4 level, that runs down toward the bottom of the shaft, diagonally?

A. No, it does not run toward the bottom of the shaft; it runs through the shaft.

(Testimony of C. W. Poole.)

Mr. WHEELER.—Exhibit “Y” now? [431—426]

A. Yes. This is the shaft (indicating); this line runs through it, and apparently intersects another line to the south of the shaft there.

Mr. THATCHER.—(Q.) Let me ask you another question: How far out was the number 4 drift on April 2d? A. How far out?

Q. Were the number 4 drifts on April 2d.

Mr. WHEELER.—North or south?

Mr. THATCHER.—North and south, either way.

A. About fifteen feet.

Q. Each? A. Yes.

Q. They were each out about fifteen feet?

A. Yes.

Q. How far were they out on April the 17th?

A. I don't know.

Q. How far were they out at the time of Bancroft's second examination? A. I don't know.

Q. Do you know how far they are out now?

A. I do not.

Q. Have you been down in the number 4 drifts?

A. Yes.

Q. When were you last down there?

A. Last November.

Q. November, 1919? A. Yes, last year.

Q. How far were they out then?

A. I don't recall, they are out a considerable distance now.

Q. Well, how far are they out now, about?

(Testimony of C. W. Poole.)

A. Oh, 150 feet, I imagine, each way, 120 anyhow.

Q. One hundred and twenty? A. Yes.

Q. But you don't know how far they were out at the time of Bancroft's last report?

A. No, I wasn't at the mine then.

Q. Well, right after that you went up to the mine, didn't you, with Mr. Jackson? A. Yes.

Q. How far were they out then?

A. Well, I don't recall, I wasn't examining them very carefully; I went down that mine with one point in view.

Q. Yes, I know about that one point; didn't you look at the mine [432—427] workings at all, other than the shaft and the number 3 north?

A. I don't recall that we did.

Q. The only thing you had in mind when you went down the mine that time was to look at the number 3, and shaft? A. Yes.

Q. You didn't have anything else in view?

A. No.

Q. Why did you have that in view at the time you made the examination?

A. Because Mr. Taylor in Lovelock had shown me a map and on that map he had assays platted, and those assays were the assays which Mr. Bancroft had taken at his second examination.

Q. And those assays showed?

A. Those assays showed a very low grade ore, and Mr. Taylor had told me that Mr. Bancroft's report was unfavorable, and I was very much interested in

(Testimony of C. W. Poole.)

satisfying myself that they were what Mr. Taylor had told me; I doubted his credibility, and I wanted to assure myself that those assays were probably assays which he had gotten from Mr. Bancroft.

Q. And Mr. Taylor had assured you, told you or stated to you, that the number 3 north and the shaft were both low grade, or no values, according to Mr. Bancroft?

A. He told me nothing; he showed me this map.

Q. Did the map which he showed you, which purported to be from Mr. Bancroft, show that the number 3 north was valueless?

A. He had only a few assays—

Q. Can't you answer that question?

A. His assays showed me it was valueless.

Q. On the number 3 north?

A. Yes, but he had only a few of them.

Q. Just answer the question.

Mr. WHEELER.—Let the witness answer the question.

Mr. THATCHER.—I move to strike it out as not responsive. [433—428]

(The reporter reads the last question and answer.)

The COURT.—I think he is entitled to a categorical answer.

A. Yes, it did.

Mr. THATCHER.—(Q.) Did you ever see Mr. Bancroft's second report?

A. I never did.

Q. You have seen it since you have been in court here, have you? A. Not his report.

(Testimony of C. W. Poole.)

Q. Did you see his assay sheet and plat made of the second report?

A. I saw the big map, I didn't see the little map.

Q. I call your attention to Exhibit 19, and ask you to refer to the number 3 level north, and the assays thereon. (Hands to witness.)

A. One per cent. 4.66 feet, $2\frac{3}{4}\%$. $8\frac{1}{2}$ feet 1.15% 8 feet, 3.35%. 5.4 feet, 1.2%. 6 feet, 1.35%. 4.33 feet, 1.25 feet, 9.4 feet, $2/10$ of one per cent. 6.3 feet.

Q. You have read the assays that are on the number 3 north, have you?

A. I have not read them all yet.

Q. Go ahead.

A. 2.2% 4.66 feet. 1.25% 3.4 feet, none. 5.7 feet, $1/10$ of one per cent. 4.66 feet. That is all that I see.

Q. Mr. Poole, what was the average width and assay of that drift? A. What was the average?

Q. Yes, according to those assays.

Mr. WHEELER.—Object, if the Court please, on the ground it is not cross-examination.

WITNESS.—I can't average in my head.

Mr. THATCHER.—If the Court please, I think it is cross-examination. He has testified as to his purpose in going down there to investigate the number 3 north, and showing as not having any values, and having been so represented to him by Mr. Taylor and Mr. Bancroft, [434—429] or the result of Mr. Bancroft's examination, and I want to show what the actual value of that was.

(Testimony of C. W. Poole.)

The COURT.—Well, it is shown there, isn't it?

Mr. THATCHER.—It does not show the average.

The COURT.—Well, he can perform the calculation at recess, if he wishes to.

Mr. THATCHER.—(Q.) At the recess will you perform—

Mr. WHEELER.—(Intg.) The question will be objected to as irrelevant and incompetent, and not cross-examination. I would like to ask the witness in that connection if the number 3 level was in the same condition when the assays were taken by Mr. Bancroft, as it was on April the 2d?

Mr. THATCHER.—I object to that question.

Mr. WHEELER.—Some of these assays were taken a foot or two beyond where the assays were the 2d of April.

The COURT.—Didn't he testify in chief something about Mr. Bancroft's report, and that he was very much dissatisfied, and very much surprised, and he went into the mine to ascertain whether it was true or not?

Mr. WHEELER.—Only as to certain things; assays at certain points. As I understood the question it was what was the average assay value of this whole drift on the north side.

The COURT.—Is not this the Bancroft report?

Mr. WHEELER.—No, I think the witness was shown on a slip of paper a rough map, upon which certain assays were written; it does not appear that they were the same assays that appear here, and

(Testimony of C. W. Poole.)

that as to two points in the mine he was dissatisfied, and he went down and examined as to those two points, for the purpose of seeing whether those two assays were correct; he is now asked as to whether the averages on the whole drift were this, that or the other, what [435—430] they amounted to, and he is to make a calculation.

The COURT.—Well, this apparently is not the document that he saw at that time.

Mr. THATCHER.—No.

The COURT.—Well then, I think that is not cross-examination.

(A short recess is taken at this time.)

Mr. THATCHER.—(Q.) Your purpose in going down the mine at this time—I am speaking now at the time when Mr. Jackson and Mr. Taylor went to the mine in the latter part of May, I think it was May 30th—was to verify or check Mr. Bancroft's assays as reported to you by Mr. Taylor, in the shaft and in the number 3 drift? A. Yes, sir.

Q. No discussion at that time took place as to tonnage? A. No.

Q. Now on Sunday you said you discussed with Mr. Taylor percentages of value of the ore?

A. I discussed that Exhibit "Y" with the percentages shown on it.

Q. On Tuesday you didn't discuss any percentages; is that correct? A. No.

Q. Nor tonnage? A. No.

Q. Nor on Wednesday, until the contract was being dictated and drawn? A. Yes.

(Testimony of C. W. Poole.)

Q. And when Mr. Taylor came out to the mine in April, about the middle of April, did you discuss tonnages with him at that time? A. No.

Q. Did you discuss percentages or value of the ore? A. Oh, yes.

Q. Told him where they would run?

A. Where they would run?

Q. Yes, where they would assay?

A. If he asked us an estimate of a particular point, we gave him our idea of it.

Q. Gave him your idea at that time?

A. Yes. [436—431]

Q. My understanding is that never on any occasion did you discuss tonnages with Mr. Taylor, or make any statement as to tonnages, except the conversation that you had immediately preceding the signing of the contract?

A. Not with Mr. Taylor, no.

Q. That is the only time you ever talked tonnage?

A. Yes.

Q. Now, will you tell me what times, giving them as near as you can, you discussed percentages, just enumerate the times when you told Mr. Taylor anything about the ore in the mine, what it would run?

A. I discussed percentages with Mr. Taylor on my getting there in May, in Denver.

Q. On Sunday? A. On Sunday, yes.

Q. When next?

A. On Wednesday when we were using this map again for these calculations; and at the time of his

(Testimony of C. W. Poole.)

visit there the latter part of April, discussed it again.

Q. Did I understand you to say you had no discussion and made no statement to Mr. Taylor at any time as to the quantity of ore blocked out in that mine; you have never made any statement to Mr. Taylor as to the quantity of ore blocked out in that mine? A. I never have.

Q. On any occasion? A. On no occasion.

Q. Either before or since he entered into that contract? A. No.

Q. Now calling your attention to Exhibit "B," when was that prepared? A. I don't know.

Q. When did you first see it? A. In Denver.

Q. What day? A. Tuesday morning.

Mr. WHEELER.—April the first?

A. April 1st that would be, yes.

Mr. THATCHER.—(Q.) Saw it first Tuesday morning, April 1st? A. Yes.

Q. Where? A. In Mr. Taylor's office. [437—432]

Q. Who was present?

A. Mr. Taylor, Mr. Nenzel, Mr. Murrish and myself.

Q. And yourself; and to whom was it first presented?

A. I think he presented this to Mr. Murrish; we were all there.

Q. You were all there, but he presented it to Mr. Murrish? A. I think so.

Q. Wasn't he endeavoring to persuade Mr. Mur-

(Testimony of C. W. Poole.)

rish to sign the contract or to make a deal on this property when he presented that?

A. Yes, I think that was part of his purpose.

Q. Didn't he use the figures there for the purpose of persuading Mr. Murrish to come in on the contract? A. Yes, he did.

Q. And didn't he also argue with Mr. Murrish by so doing the stock that would be left to Mr. Murrish and the other stockholders would be of more value than if he went through with the original option; was that argument advanced by him?

A. Well, Mr. Taylor assumed that—

Q. (Intg.) Just answer the question.

A. Was that argument advanced there?

Q. Yes. A. It was advanced, yes.

Q. To Mr. Murrish? A. To all of us.

Q. Was it addressed particularly to Mr. Murrish?

A. Yes.

Q. Why? A. Why?

Q. Yes.

A. Because Mr. Murrish was adverse to any deal, as I understood him.

Q. Mr. Murrish was adverse to any deal at that time? A. Yes.

Q. Do you know why Mr. Murrish was holding out on the deal?

A. I think there were two reasons.

Q. What were they, if you recollect?

A. Mr. Murrish felt quite confident if Mr. Taylor didn't exercise his option that we could get some one

(Testimony of C. W. Poole.)

else who would be interested in the property [438—433]

Q. What was the other reason?

A. I think that was a personal reason.

Q. What was the reason?

A. Well, he figured that Mr. Friedman might enlarge his interest in the property if he would consent to a deal.

Q. Isn't it a fact that Mr. Murrish insisted at that time that Mr. Nenzel exercise his power of attorney, and turn over to him a hundred thousand shares of stock? A. It is not.

Q. Didn't he insist on getting some stock which he contended was due him from Mr. Friedman?

A. No, he did not.

Q. Not at that time? A. No, he did not.

Q. You didn't hear such a statement made at any time during the conversation?

A. Any such a statement as you have made? No.

Q. What was the statement, tell the exact facts.

A. Mr. Murrish told Mr. Friedman before he left Lovelock that he would not consent to any deal which reduced his interest in that property less than one-half; that is, he would not give up to Mr. Taylor more than one-half of his holdings in consideration of Mr. Taylor paying the debts.

Q. There wasn't any controversy at that time in reference to Mr. Murrish's holdings in the corporation while you were in Denver?

A. Wasn't any controversy?

Q. Was there any controversy at all?

(Testimony of C. W. Poole.)

A. Yes, there was a controversy.

Q. Didn't Mr. Murrish insist at that time that he was entitled to a larger holding than that which had been given to him on the books of the company?

A. No.

Q. He didn't? A. No.

Q. Calling your attention to Exhibit "B," on the back of the first page near the bottom to the following words: "In order to make investment safe only necessary to show at \$8 market 35,000 tons of ore; [439—434] \$10 market, 25,000 tons of ore." Was that discussed at that time?

A. Was it discussed?

Q. Yes. A. Yes, it was discussed.

Q. What day? A. Tuesday.

Q. On Tuesday. Where did Mr. Taylor get the figures of 35,000 tons?

A. I think they are a figment of the imagination.
Mr. COOKE.—Think it was what?

A. A figment of the imagination; he was assuming certain things.

Mr. THATCHER.—(Q.) Where did he get the figures 25,000 tons? A. He figures—

Q. (Intg.) I am asking you if you know; what is our best surmise as to that?

A. As to where he got them?

Q. Yes.

A. Mr. Taylor knew approximately what the debts were; he knew approximately the operating costs; he assumed a certain figure for the price of tungsten, and then he worked out the proper num-

(Testimony of C. W. Poole.)

ber of tons which would be necessary at that ten-dollar market in order to make a safe investment as against the debts.

Q. And he arrived at 35,400 tons on an eight-dollar market; is that correct? A. Yes.

Q. And he arrived at 25,500 tons at a ten-dollar market; is that correct?

A. That is what it says there.

Q. I am asking you if you recollect?

A. That is what he had there.

Q. And at that time you had made no representations to him, and you had never discussed with him the tonnage in the mine? A. I certainly had not.

Q. And you saw these figures at that time, did you not? A. Yes.

Q. And read them carefully? A. Yes.

Q. And on what kind of a basis did you say Mr. Taylor was expecting to deal with others? [440—435]

A. He said that if there was that quantity in the mine, the mine would be on a banking basis.

Q. And didn't Mr. Taylor say that he wanted the proposition upon a banking basis?

A. He did not.

Q. Did he say who he was going to interest in this property?

A. He said he hoped to interest some New York Trust Company on a banking basis.

Q. On a banking basis? A. Yes.

Q. And yet never at any time did he discuss with you, nor did you tell him what the tonnage of ore

(Testimony of C. W. Poole.)

or values in that mine were? A. I did not.

Q. Did you testify yesterday as follows: "He said that he contemplated if he got such a deal as is here proposed from us, that he would go East, and try and interest some trust company, and he felt that 35,000 on a ten-dollar basis would put that mine on a banking basis—on an eight-dollar basis; and on a ten-dollar basis he felt that 25,000 tons would put the mine on a banking basis."

A. Yes, I testified that way.

Q. Now you knew that Mr. Taylor under the terms of his contract which had then been agreed upon, was going to endeavor to sell the preferred stock in this corporation for enough to pay the debts, didn't you?

Mr. WHEELER.—Objected to on the ground it assumes that on Tuesday the first day of April, the terms of the contract had been agreed upon, at the time that exhibit "B" was presented, which is not in accordance with the testimony.

(The reporter reads the question.)

WITNESS.—Had it been agreed on then?

Mr. THATCHER.—(Q.) Well, you did know at the time you saw this paper that Mr. Taylor contemplated under the terms of this paper [441—436] itself, selling preferred stock for enough money to pay the debts of the company, didn't you?

A. Yes, I knew that.

Q. And that preferred stock was to be redeemable with seven per cent interest, was it not; you knew that, too, didn't you? A. Yes.

(Testimony of C. W. Poole.)

Q. And you knew that Mr. Taylor contemplated that if the deal was made with you folks that he would go East and endeavor to float this loan; is that correct? A. Yes.

Q. Upon a banking basis?

A. Not to every one that he presented it; he had several clients in mind, and mentioned some of them.

Q. Well, didn't you understand if he closed this deal with you that he was going East to endeavor to float this loan on a banking basis?

A. If he could, yes.

Q. Didn't Mr. Taylor repeat to you at all times that he was going into this thing, and would float it upon a banking basis?

A. He certainly did not.

Q. Did he ever use the words "banking basis" upon any other occasion? A. Yes.

Q. When?

A. In Lovelock, at the time I met him with Mr. Jackson.

Q. At the time you met him with Mr. Jackson?

A. Yes.

Q. And he then used the words banking basis?

A. Yes.

Q. What did he say then?

A. Well, in our conversation there I finally said, "Just what did Mr. Bancroft report, if you know?" and he says, 19,800 tons, and I said "Well, what of it?" I said "The most tonnage I ever heard you mention, Taylor, was 35,000 tons, and that is what

(Testimony of C. W. Poole.)

you considered necessary to go in on this thing on a banking basis.”

Q. Now in your conversation at Lovelock, Mr. Taylor stated to you that Bancroft’s report showed 19,800 tons; is that right? [442—437]

A. Yes.

Q. And on what day did that conversation take place?

A. Well, it was on a Saturday, the last Saturday in May.

Q. The last Saturday in May, and when did you go up to the mine?

A. We went up there at noon.

Q. That same day? A. Yes.

Q. And when you got to the mine and made your examination, the only examination you made was as to the assays in the number 3 north and the shaft, is that correct? A. Yes.

Q. And you made no investigation for the purpose of determining tonnage? A. No.

Q. And you knew at that time the tonnage which Mr. Bancroft had reported to Mr. Taylor?

A. I knew what Mr. Taylor said.

Q. And did he at that time in conversation at Lovelock use the words “banking basis”; you said a minute ago that he did, how did he say it?

A. That is the only time it came up, I said “And what of it? The greatest tonnage I ever heard you mention, Taylor, was 35,000, and that was to go into this thing on a banking basis.”

Q. Oh, you did mention 35,000 tons to him in the

(Testimony of C. W. Poole.)

conversation at Lovelock before you went up to the mine? A. Yes.

Mr. WHEELER.—The witness so testified a few minutes ago.

Mr. THATCHER.—(Q.) You mentioned 35,000 tons at that time? A. Yes.

Q. So that is another conversation in which tonnage is brought into question? A. Yes.

Q. You made no statement, however, that there was 35,000 tons? A. I certainly did not.

Q. But you knew that Mr. Taylor had previously contemplated 35,000 tons in that mine?

A. I recollected this exhibit. [443—438]

Mr. WHEELER.—Exhibit “B” you are talking about? A. Exhibit “B,” yes.

Mr. THATCHER.—(Q.) Then in Denver you knew that Mr. Taylor contemplated that there was in this mine 35,000 tons of ore at the time he prepared Exhibit “B”?

A. I didn’t know that he contemplated any tonnage.

Q. Didn’t you know that? A. No.

Q. When Mr. Taylor presented this, did you tell him there wasn’t 35,000 tons in that mine?

A. I certainly did not.

Q. Did you tell him he was wrong?

A. I think there are 35,000 tons in that mine, I still think so.

Q. Did you at that time tell Mr. Taylor there was or was not 35,000 tons in that mine of 1.75 tungsten?

A. I did not.

(Testimony of C. W. Poole.)

Q. Did you tell him there wasn't 25,000 in the mine? A. I did not.

Q. Did you tell him that was a conservative estimate, 35,000? A. I did not.

Q. Did you tell him 25,000 would be a conservative estimate? A. I did not.

Q. You say you believed at that time there was 35,000 tons of ore? A. Yes.

Q. Of 1.75 tungsten? A. Not 1.75 tungsten.

Q. How much would it run in tungsten?

A. In the mine?

Q. Yes, in the mine at that time.

A. I think there is considerable more than 35,000.

Q. Did you think at that time there was that amount blocked out? A. I did not.

Q. Did you think there was that much in sight?

A. I did not.

Q. Did you think there was that much indicated?

A. I did not.

Q. Did you correct Mr. Taylor, or endeavor to correct him, in his [444—439] use of 35,000 tons, at the time he prepared exhibit "B"?

A. There was nothing to correct him for; he was laboring under no misapprehension.

Q. When he presented these figures to you, did you call his attention to the fact that there was not blocked out in this mine, or indicated in this mine, or developed in this mine, 35,000 tons?

A. I did not.

Q. Did you at that time, or did Mr. Murrish or Mr. Nenzel, call his attention to that fact?

(Testimony of C. W. Poole.)

A. I think they did not.

Q. Did you at that time call his attention to the fact that there was not blocked out, developed, in sight, or indicated in that mine 25,500 tons?

A. I did not.

Mr. COOKE.—What is the occasion for these questions? There is nothing on that exhibit that indicated Mr. Taylor assumed they were in sight; the talk was about a nine-year period of working.

Mr. THATCHER.—(Q.) Did any of the others call his attention to that fact?

A. Not so far as I know.

The COURT.—(Q.) When you say that you don't believe there were 35,000 tons blocked out in the mine, in what sense do you use the words blocked out—exposed on four sides?

A. I call ore blocked out when it is exposed on four sides; but I consider ore that is not blocked on four sides, that is, not exposed on four sides, in the ordinary engineering sense is still blocked ore; for instance, if there is an exposure of a body of ore on two sides, I consider that a certain percentage of ore is in sight by those exposures, as much within the meaning of in sight as another tonnage would be if it were exposed on four sides.

Q. When you said you didn't believe there were 35,000 tons blocked out, you meant there were not 35,000 tons exposed on two sides in the mine at that time?

A. I meant that there was not sufficient development work to expose [445—440] that amount of

(Testimony of C. W. Poole.)

tonnage on three sides, four sides, two sides or one side; the development was not sufficient at that time to indicate that tonnage; there were, however, collateral circumstances, aside from the development, which would lead any engineer to the opinion that there possibly might be a much greater tonnage than 35,000 tons in the mine.

Mr. THATCHER.—(Q.) I call your attention to Plaintiff's Exhibit number 12, and ask if you ever saw that letter before—did you ever see it before? (Hands to witness.)

A. That is the letter you showed me this morning.

Q. Yes. You never saw it before until to-day or yesterday?

A. Not to the best of my recollection.

Q. I call your attention to this paragraph in the letter; "In order to work in with Bancroft's position, I suggest that Poole come to Denver during the first week in April, bringing exact data as to development work, assays, etc., so that he and Bancroft together can work up a definite tonnage statement of present ore developed." Was that ever called to your attention before you went to Denver?

A. No.

Q. Mr. Friedman, the President of the company, to whom this letter is addressed, didn't call your attention to it? A. No, he did not.

Q. You did take maps with you, however?

A. Oh, yes.

Q. Did you take any assays with you?

(Testimony of C. W. Poole.)

A. I took the maps just in the shape they are.

Mr. WHEELER.—The map, Exhibit “Y”?

A. All of them.

Mr. THATCHER.—(Q.) Have you any map here which has an assay plan on it? A. Have I?

Q. Yes. [446—441]

A. No, I never had one.

Q. Did you have one then at that time?

A. I had a copy of plate 5.

Q. Of Bancroft’s report?

A. Yes, Mr. Bancroft had sent that to me; I don’t know whether I had it with me or not, but he had sent it to me at the mine, or at Rochester, and he had sent two to the mine, I had seen that.

Q. Did you have any assays, or were any assay certificates or reports presented to you before you left to go to Denver? A. No.

Q. None at all? A. No.

Mr. WHEELER.—You are speaking now of assays as distinct from pannings?

A. Yes, he said assay certificates, as I understood him.

Mr. THATCHER.—(Q.) You stated a moment ago, or was it Mr. Cooke, that this Exhibit “B” contemplated running the mine over a long period of time, is that right?

A. Yes, it mentions nine years.

Q. Nine years, that was the period for the work? What was the capacity of the mill that you had over on this property?

A. You mean tons of ore per day?

(Testimony of C. W. Poole.)

Q. Yes, sir, tons of ore per day.

A. About one hundred tons per day.

Q. About one hundred tons per day, that would be how much in a year?

A. That would be 36,000 tons, probably more than that—yes, 36,000. It would be 3,000 tons a month, twelve months, it would be 36,000 tons.

Q. Then the 35,000 tons referred to here was just one years ore about, wasn't it?

A. Well, it is 36,000 and 35,000, they are practically the same figure; yes.

Mr. WHEELER.—(Q.) One thing I would like to be clear on; The [447—442] figures on that map refer to a nine-years run, or over 270,000 tons of ore in the mine—I mean the exhibit "B"?

A. Well it does not state tonnage, it states production.

Q. Well, the proposition is this, the plan as outlined there seems to contemplate running for nine years? A. Yes.

Q. At a ton a day, which would give between two and three hundred thousand tons of ore in nine years, wouldn't it?

A. It was a production of one ton of scheelite per day.

Q. One ton of scheelite per day?

A. Yes, that is right.

Q. How many tons of ore make a ton of scheelite, assuming a percentage of 1.75?

A. I can't give you that figure offhand. Let's see, 1.75, that is not net.

(Testimony of C. W. Poole.)

Q. At any rate, are you sufficiently familiar with the subject in your mind to say that a nine-year run, producing one ton of scheelite per day on ore that went 1.4 or 1.75 would call for between two and three hundred thousand tons of ore?

A. Yes, it would.

Mr. THATCHER.—(Q.) Is there anything in exhibit “B” which would indicate or show you, outside of the nine-years run, that 250,000 tons of ore was contemplated? A. Is there?

Q. Yes, sir. Take the first page of figures; I call your attention on the first page to “Ten-dollar basis, gross profit, \$1,401,000.” On a ten-dollar basis, what tonnage would it take for that?

A. It would take 157,000 tons, wouldn’t it—I don’t know, I can’t calculate that in my head.

Q. You can’t calculate it in your head. Now when you got to San Francisco, was there any discussion between yourself and Mr. Jackson, or any one else, with reference to tonnage? [448—443]

A. Was there?

Q. Yes. A. Not that I recall.

Q. You don’t recall any discussions of tonnage?

A. No, I don’t.

Q. When did you first see Mr. Bancroft’s report, Mr. Poole? A. When did I first see it?

Q. Yes.

A. I saw the report Sunday, in Denver, the latter part of March—March the 30th.

Q. Who gave it to you? A. Mr. Taylor.

Q. What did you do with it, take it with you?

(Testimony of C. W. Poole.)

A. Took it to the hotel, Brown Palace Hotel, that evening.

Q. Did you read it over? A. Yes.

Q. Did you examine it with some care?

A. Not with great care, I read it through.

Q. Read it through? A. Yes.

Q. Was there anything in that report that would show you how Mr. Bancroft figured the tonnages in a mine, or indicated ore?

A. Was there anything in it?

Q. Yes.

A. Well, there was nothing that fixed itself on my mind; I don't think there is anything in it.

Q. There is nothing in the report that would show you that, according to your best recollection?

A. Not according to my best recollection.

Q. You stated Mr. Taylor had a letter, telegram or memoranda, or something of that kind, which showed Mr. Bancroft's method.

A. Yes, he had something there.

Q. Did you see it?

A. I didn't examine it; he had it alongside of him, using it.

Q. Did you read it? A. No, I did not.

Q. Did you discuss it with him at all, with Mr. Taylor? A. Did I discuss it? [449—444]

Q. Yes, Bancroft's method?

A. I asked him certain questions.

Q. What did you ask him?

A. Well, I remember asking him how many cubic feet of ore in place Bancroft considered a ton.

(Testimony of C. W. Poole.)

Q. And how much did he say?

A. My best recollection is he said fourteen; he may have said thirteen or fifteen.

Q. And was fourteen used in the calculations of tonnage made at that time?

A. The figure Mr. Bancroft gave was used; I didn't make the calculations and I am not certain.

Q. You don't recall whether fourteen or fifteen, or what figure for the number of cubic feet per ton was used at that time?

A. I don't recall the exact figure; I know it was 13 or 14 or 15, 13 or 14 is my best recollection.

Q. Your best recollection is it was 14?

A. That is my best recollection, it was 14, yes.

Q. Will you at the noon recess compute the tonnage in blocks "M" and "N," using the data which you have on your mine map, assuming it to be the average width throughout the block, and using 14 cubic feet as a ton?

Mr. WHEELER.—I think the witness has shown himself quite capable of making these calculations, but I don't think such a burden should be put upon him.

Mr. THATCHER.—There is a conflict of testimony on that, if the Court please; Mr. Taylor testified that he did not make those calculations.

Mr. WHEELER.—He has shown himself quite capable of making those calculations; if you want those figures we are not prepared to give them to you as a mere accommodation; the witness should

(Testimony of C. W. Poole.)

have his lunch. It is not cross-examination, and we object.

The COURT.—I think I will sustain the objection to that as not being cross-examination. [450—445]

Mr. THATCHER.—(Q.) Well, will you voluntarily agree to do that?

A. Will I agree to do it?

Q. Yes.

A. Yes, I will agree to do it; I will gladly do it if you want it done.

Q. I should like to have it.

A. I would like to say this, though, may I say one thing more?

The COURT.—Certainly.

WITNESS.—You realize, Mr. Thatcher, on this Exhibit “Y” are averages of widths there, 5 to 15 feet, and in this calculation of tonnage which Mr. Taylor made in my presence, the discussion came up as to what was the proper width to use with reference to those places where the width is not accurate, and I recommend to Mr. Taylor, I thought a conservative thing would be to be guided by Mr. Bancroft’s report, and I remember we looked in Mr. Bancroft’s report, and the widths set down there as four and a half feet to five feet—I don’t recollect whether four and a half or five feet was the width used in these calculations or not, and I would like to have you tell me whether you wish me to use four and a half or five feet, or ten feet.

(Testimony of C. W. Poole.)

Q. Use as near as you can the figures that are on that map.

Mr. WHEELER.—The witness says that he does not know, that he suggested this to Mr. Taylor, and does not know what Mr. Taylor used.

WITNESS.—I would be glad to make these calculations for you if you would tell me definitely what calculations it is you want made.

Mr. THATCHER.—(Q.) When you made these calculations at that time you had two maps in front of you, did you? A. Yes.

Q. And what were those maps?

A. One was the mine map, Exhibit “Y,” and the other was a photostat, an extra copy of the photostat in Exhibit 15. [451—446]

Mr. WHEELER.—Plate 5? A. Plate 5, yes.

Mr. THATCHER.—(Q.) What other instruments did you use in working out the calculations?

A. What other instruments?

Q. Yes; used a ruler, did you?

A. Used a couple of them.

Q. I understand you searched through Mr. Bancroft’s office and drafting table, and were unable to find any drafting rulers, or engineer’s rulers?

A. Yes.

Q. And then you used an ordinary ruler?

A. Yes.

Q. One with advertising on it? A. Yes.

Q. Was Mr. Bancroft’s office locked at that time?

A. Was it locked?

Q. Yes. A. There were two offices.

(Testimony of C. W. Poole.)

Q. Yes.

A. As I recall it; the first office in which Mr. Bancroft had his library, and in which most of our conferences took place, was an office which Mr. Taylor was occupying himself; Mr. Taylor explained that he had been away to war and given up his offices, and that he was temporarily using Mr. Bancroft's office. Then there was another room there in which there was a drafting table, and as I recall it, there was a drawer under the drafting table with some drafting instruments in it, and he searched both of those offices.

Q. Were you with him at that time when he was looking for them? A. Was I with him?

Q. Yes, when he was looking for the drafting instruments, or ruler?

A. I remember being with him when he pulled the drawer out in the room where the drafting table was; whether it was a drawer in that drafting table or a cabinet alongside, I don't recollect.

Q. You don't recollect, didn't pay much attention to it A. No. [452—447]

Q. You didn't find any scale or ruler at that time? A. No, we didn't find any scale.

Q. Did you testify yesterday, Mr. Poole, that you didn't give Mr. Taylor any percentages at all until the conference or meeting on the morning of Wednesday? A. Did I testify that way?

Q. Yes. A. I think not.

Q. Did you testify as follows yesterday; "Did you on that occasion or on any occasion prior to

(Testimony of C. W. Poole.)

entering into the contract Exhibit "C," state or represent to him that there were in that mine either blocked out or in sight or developed any quantity of ore whatever? A. I did not." Did you so testify? A. I did.

Q. "Q. Were the figures as to values, or any of them appearing on plate 5, other than those which appeared upon the original photostat, placed either by you or by Mr. Taylor upon the photostat which you say was used on the 2d day of April in the conversation that you had with Mr. Taylor?

A. I don't think the percentages were placed on that photostat, though I could not be certain of that." Did you so testify yesterday?

A. Yes, certainly I did.

Q. Did you testify as follows: "I had cautioned Mr. Taylor against the unreliability of those estimates on the map, and I scarcely think that I would have put them down myself on that photostat; he may have put them down and I not known it, as he had our maps most of the time while we were in Denver." A. Yes.

Q. "But I don't recall having put those percentages down myself, and I scarcely think I would have done it." Did you so testify yesterday?

A. Yes.

Q. Did you testify as follows: "Q. By that photostat what photostat [453—448] do you mean? A. I mean the photostat I have just described as prepared by Mr. Taylor and myself. Q. On the 2d day of April? A. Yes. Q. When

(Testimony of C. W. Poole.)

you speak of those figures you cautioned him against, what figures do you refer to? A. I refer to the figures in this exhibit of our map, whatever you call that, the one you just put in evidence. Mr. Thatcher.—The mine map, Exhibit “Y.”

A. Yes. Mr. Wheeler.—(Q.) By that you mean the figures— A. (Intg.) The figures showing

certain percentages, shown on the map in several places. Q. The figures showing the percentages, not the figures showing the tonnage? A. No,

just the figures showing percentages. Q. What

did you say to him on that subject? You say you

cautioned him? A. I told him those figures were

merely estimates which had been placed on that

map by John Huntington, who was the mining

engineer who had brought this map up to date,

and that Mr. Huntington had gotten that informa-

tion from Mr. Morrin, who was the superintendent,

and Mr. Morrin had arrived at those values by

panning in the mine; and he knew, as well as I

did, that panning was a very unreliable way of

arriving at the value of ore. Q. This you say was

what you said to him? A. Yes.” Did you so tes-

tify? A. Yes.

Q. Now when Mr. Taylor was at the mine in the middle of April, you took him through, did you, through the mine? A. Yes.

Q. You came there in response to a telegram from the mine, did you, from Tonopah?

A. I came from Tonopah, and my best recollec-

(Testimony of C. W. Poole.)

tion is that either Mr. Friedman or Mr. Nenzel wired me that I had to come.

Q. That Mr. Taylor was coming? A. Yes.

Q. And at that time you went through the mine?

A. Yes.

Q. Did you at that time check up the distances with Mr. Taylor on new work? A. Yes.

Q. Were many pannings taken?

A. Yes, quite a few. [454—449]

Q. How many were taken, if you recollect?

A. Oh, twenty-five or thirty, maybe more, I can't say.

Q. Did Mr. Taylor do any panning?

A. He took a few.

Q. And you testified that he was not a very skillful panner, I understand? A. Yes.

Q. He didn't know anything about panning, did he?

A. Well, he knew the method, but he was clumsy.

Q. He was clumsy, and he wasn't a good panner?

A. No.

Q. At that time you panned about twenty-five or thirty pannings?

A. The superintendent did most of the panning.

Q. You and the superintendent? A. Yes.

Q. How many did you and the superintendent pan altogether? A. Twenty-five or thirty.

Q. Didn't you testify yesterday that you panned a hundred?

A. I may have; we may have panned a hundred.

Q. Didn't you so testify yesterday?

(Testimony of C. W. Poole.)

A. If I did, I certainly did.

Q. Were they taken from all parts of the mine, these pannings that you took on that occasion?

A. Not from all parts, no.

Q. What workings did you visit?

A. Visited all the workings.

Q. How many feet of workings are there in the mine?

A. I can't say; possibly three or four thousand feet, maybe more.

Q. How long were you down in the mine?

A. I think we were down all forenoon.

Q. Two or three hours or four hours?

Mr. WHEELER.—He said all the forenoon.

A. Possibly four hours.

The COURT.—(Q.) Did I understand you to say you did any measuring at that time?

A. Yes, I had been very cautious in Denver as to the representations [455—450] I made to Mr. Taylor, and one of the things I had vouched for was that the development work as shown on that map, had been done; I said, "Mr. Taylor, I am positive of that" and I wanted to keep Mr. Taylor's confidence, because I expected to be superintendent of that property if Mr. Taylor went through with this thing, and I knew Mr. Taylor was very suspicious at all times.

Mr. THATCHER.—I move to strike it out as not responsive.

The COURT.—The suspicions?

Mr. THATCHER.—Yes.

(Testimony of C. W. Poole.)

The COURT.—Well, that may go out.

WITNESS.—(Contg.) And I wanted to assure Mr. Taylor all representations that I had vouched for in Denver were correct. I took a tape down in the mine underground, and took the map down with me, and checked up those distances right before him, so that he could see that work actually had been done.

Mr. THATCHER.—(Q.) Mr. Taylor stated to you at the time you were in Denver that he relied on you, and expected to have you as superintendent of that mine, did he not? A. He certainly did.

Q. Did you take a map down in the mine in April?

A. Did we take a map?

Q. Yes, when you went down with Mr. Taylor?

A. Yes, we took the mine map.

Q. Which is the mine map that you took down?

Mr. WHEELER.—Exhibit “Y”?

A. Exhibit “Y.”

Mr. THATCHER.—Is that Exhibit “Y”?

A. Yes.

Q. Are these the mine maps you took to Denver with you on that occasion?

A. Yes, every map there was in Denver.

Q. Every map that is here was in Denver?

A. Yes.

Mr. COOKE.—You mean the maps you have in your hand, that were handed to you by us this morning? [456—451]

Mr. THATCHER.—Yes, a bunch of them. We would like to examine these at recess.

(Testimony of C. W. Poole.)

Mr. WHEELER.—Take them, Mr. Thatcher, and examine them, certainly.

At 12 o'clock a recess is taken until 1:30 P. M.

AFTER RECESS—1:30 P. M.

Cross-examination of Mr. C. W. POOLE, Resumed.

Mr. THATCHER.—(Q.) Mr. Poole, my recollection is you stated you had never seen the letter to Mr. Friedman of March 25th, in which Mr. Taylor requested that you come to Denver, and bring the maps showing exact data as to development, etc., Exhibit Number 12, I refer to; that is the letter I showed you this morning? A. Yes.

Q. Did you ever see any other letter or telegram, either to Mr. Nenzel or to the mine, or to Mr. Friedman, or to any of the other defendants, which requested that exact information or data with reference to the development work and assays be furnished Mr. Taylor?

A. I don't recall any such letter.

Q. Did you ever receive any such letter?

A. No, I didn't receive any such letter.

Q. You don't know whether Mr. Taylor ever wrote you such a letter asking you to furnish assays, maps or developments of the mine?

A. I don't know?

Q. Yes, do you?

A. I don't think he did; I have no recollection of any such letter.

Mr. COOKE.—(Q.) That is, you mean that you didn't receive it? A. I didn't receive it, no.

(Testimony of C. W. Poole.)

Mr. THATCHER.—(Q.) I call your attention to what purports to be a copy of a letter, and ask you if you ever saw the original of that? (Hands to witness.) [457—452]

A. Yes, I think I saw the original of that letter, Mr. Thatcher.

Q. Did you receive it in the mail?

A. I think I did, yes.

Q. Have you the original now?

A. I haven't it in my pocket; it may be here; I turned over all my correspondence to the attorneys; if I had it, they have it.

Mr. COOKE.—We have no objection to your using a copy.

Mr. THATCHER.—We offer it in evidence, if the Court please. It has been identified as a copy of a letter received by Mr. Poole from Mr. Taylor.

The COURT.—Any objection?

Mr. COOKE.—We object to it as incompetent, irrelevant and immaterial, and especially assign that it does not tend to prove any issue in this case. It is not a request upon this witness for data as to anything except data by which the workings shown upon Mr. Taylor's maps in Denver may be kept up with the workings made on the ground.

The COURT.—It may go in.

Mr. THATCHER.—(Q.) You testified yesterday, Mr. Poole, that you saw either Mr. Bancroft's telegram to Mr. Thane, or Mr. Taylor's telegram to Mr. Thane with reference to ore tonnage; is that correct? A. I saw a copy of it.

(Testimony of C. W. Poole.)

Q. A copy of it? A. Yes.

Q. Didn't you see the original? A. No.

Q. Didn't you see the one that Mr. Thane received? A. No.

Q. Didn't you have that in your possession, and send it back to Mr. Thane?

Mr. DAVIS.—One moment. I think you will find the record is this letter you last introduced in evidence, is already in evidence as Plaintiff's Exhibit 5.

Mr. COOKE.—Yes, that is correct. [458—453]

Mr. THATCHER.—Then we withdraw that, the last one, and let Exhibit Number 5 stand.

Q. Didn't you see the original telegram which was received by Mr. Thane; didn't you have it in your possession, and mail it back to Mr. Thane?

A. I did not.

Mr. COOKE.—What particular telegram are you talking about?

Mr. THATCHER.—The one in which he stated yesterday in his direct examination that he was familiar with the telegrams that referred to tonnages in the mine, sent by Mr. Taylor to Mr. Thane, and which he referred to at the time in which he says he stated that Mr. Taylor was lying to him, not telling the truth.

Q. I call your attention to a letter and a telegram, and ask you if you ever saw those before? (Hands to witness.)

A. Yes, I have seen these before.

(Testimony of C. W. Poole.)

Q. Is that the telegram you referred to yesterday in your testimony?

A. I believe that that telegram was left in my box at the New Willard Hotel, and I examined it and attached that note and left it in Mr. Thane's box.

Q. Is that the telegram you referred to in your testimony yesterday?

A. The thing that I referred to was a copy of that telegram; that was all I recollected; Mr. Thane had made a copy of that, and he gave me the copy on a sheet of paper, a blank sheet of paper, as I recall; I had forgotten this incident.

Mr. DAVIS.—A copy of that telegram is already in evidence marked Defendant's Exhibit "D."

Mr. THATCHER.—Well, I want the letter and telegram identified, and have them in as they stand.

Q. What was done with it?

A. The best of my recollection is that it was not mailed; the whole thing occurred at the new Willard Hotel; he left it in my box and I looked at it, and wrote that note and left it in his box at the New Willard Hotel in Washington; that is my recollection of it.

Mr. COOKE.—No objection as far as we are concerned. It is already in evidence.

(Telegram dated May 25, 1919, from David Taylor to B. L. Thane, and letter dated May 26, 1919, from C. W. Poole to B. L. Thane, marked Plaintiff's Exhibit No. 49.)

(Testimony of Rudolph Nenzel.)

Mr. THATCHER.—That is all.

Mr. WHEELER.—That is all, Mr. Poole. [459—454]

Testimony of Rudolph Nenzel, for Defendants.

Mr. RUDOLPH NENZEL, one of the defendants, called as a witness on behalf of the defendants, having been previously sworn, testified as follows:

Direct Examination by Mr. WHEELER.

Q. Mr. Nenzel, you are one of the defendants in this action? A. Yes, sir.

Q. Were you in Denver, Colorado, on the 30th day of March, 1919? A. I was.

Q. Were you also there on the 31st day of March, and the first and second days of April?

A. Yes, sir.

Q. Were you in the office of David Taylor, the plaintiff in this action, on each of those days?

A. I was.

Q. Was there on any or either of those days, or at any time or place on the occasion of your visit to Denver at the times just testified to by you, any statement made by you that there was at that time blocked out, in sight and ready for mining and reduction of the concentrates, over 60,000 tons of scheelite ore, which would carry an average of 1.75 per cent tungstic acid? A. No, sir.

Q. Was there on any of those occasions, or at any time while you were in Denver on those dates, any statement made by you to the plaintiff David Taylor that there was over 60,000 tons of scheelite

(Testimony of Rudolph Nenzel.)

ore in the mine or mining property of the defendant, Nevada Humboldt Tungsten Mines Company?

A. No, sir.

Q. Was there on any or either of those days or dates, or on the occasion of your said visit to Denver, any statement made by you to David Taylor, that the ore, or any quantity thereof, in the Nevada Humboldt Mines Company's property would carry an average of 1.75 per cent tungstic acid?

A. No, sir.

Q. Was there on any or either of those occasions any statement of [460—455] the kind or character, or in substance or in form, indicated in my previous questions, made to Mr. Taylor in your presence, by the defendant Murrish? A. No, sir.

Q. Was there on any or either of those occasions at any time during your said visit to Denver, any statement of a similar kind or character to this indicated in my previous questions, made in your presence by the defendant Poole?

A. There was not.

Q. Did Mr. Poole on Monday, the 30th or 31st day of March, 1919, state in your presence to the plaintiff Taylor that there was over 60,000 tons of ore developed within blocks indicated by the lines upon the map plate 5, annexed to Plaintiff's Exhibit 15? A. No.

Q. You are familiar with that plate, are you, and that exhibit? A. I am.

Q. Was there on that occasion any statement made in your presence by the defendant Poole to

(Testimony of Rudolph Nenzel.)

the plaintiff Taylor, that there was any tonnage of ore in that mine which would average over 1.75 per cent tungstic acid? A. No.

Q. Was any statement in substance or to the effect just indicated in my last questions to you made in your presence by Mr. Poole to the plaintiff David Taylor. A. No.

Q. Did the defendant Poole in your presence in talking to David Taylor on the occasion of your visit to Denver in 1919, in the months of March and April, say, in substance or effect, "There are 60,000 tons of ore" referring to the mine or mines of the defendant, Nevada Humboldt Tungsten Mines Company, "60,000 tons of ore that will average over 1.75 per cent, developed in the mine"?

A. No.

Q. Did he say that there were more than 60,000 tons blocked out, developed and in sight, or blocked out, or developed, or in sight in the said mines?

A. He did not. [461—456]

Q. Did Mr. Poole on any day on the occasion of that visit to Denver in your presence state to the plaintiff David Taylor, that there was any tonnage of ore blocked out in the mine or mines of the defendant Nevada Humboldt Tungsten Mines Company? A. No, sir.

Q. Did he say that in substance or effect? Did he say in substance or effect that there was any tonnage of ore blocked out in the mine?

A. He did not.

(Testimony of Rudolph Nenzel.)

Q. Did he say that it was in sight or developed in the mine? A. No, sir.

Q. Any tonnage. A. No, sir.

Q. When did you first see plate 5 annexed to plaintiff's exhibit 15, in its present condition? (Hands to witness.)

A. Here in the court room.

Q. Had you prior to that time seen what you can identify or recall as a photostat to any part or portion of plate 5? A. Yes, sir.

Q. Where had you seen such a photostat?

A. We had one in Lovelock in the office.

Q. Had you seen any other at any other time or place?

A. In the office of David Taylor, Denver.

Q. When?

A. On Sunday afternoon, March 30, 1919.

Q. Was that identical with plate 5, or was it the photostat referred to by you a moment ago, or a duplicate of it? A. A photostat.

Q. Where was it when you saw it; in what condition, in what place?

A. It was attached to the report of Mr. Howland Bancroft.

Q. Was the report on that day presented to either you or Mr. Poole by Mr. Taylor?

A. Yes, sir, it was given to Mr. Poole and I read it.

Q. And you read it? A. Yes. [462—457]

Q. Where did you read it, at the office of David Taylor, or at the hotel that night?

(Testimony of Rudolph Nenzel.)

A. I think I read it at the hotel.

Q. You saw the photostat at that time?

A. Yes, sir.

Q. And you know that it did not contain the marks, all the marks, that now appear thereon?

A. Yes, sir.

Q. Can you say that the document in your hand, Exhibit 15, is the identical document that on that occasion was given into the hands of Mr. Poole in your presence by Mr. Taylor?

A. No, it may be a copy of it.

Q. It may be a copy of it. If it is a copy what would be your best impression, is it a duplicate or—

Mr. THATCHER.—I object.

Mr. WHEELER.—(Q.) In other words, you can't definitely identify this as the precise document? A. I cannot.

Q. Was the plate, Exhibit 5, annexed to Exhibit 15, in its present condition ever at any time in your presence, or by you inspected or seen by you in Denver in the year 1919? A. It was not.

Q. You mention having seen a photostat in the office of David Taylor; in what condition was that photostat?

A. He had two copies, as I remember, he got out of the drawer of a filing cabinet of some kind.

Q. On what day did you see the photostat or photostats of which he had two copies that he got out of a drawer? A. That was on Wednesday.

(Testimony of Rudolph Nenzel.)

Q. Who was present at the time that the photostat referred to by you, or photostats, were produced by Mr. Taylor?

A. Mr. Poole and Mr. Taylor and myself.

Q. You, Mr. Poole and Mr. Taylor were together? A. Yes.

Q. Had Mr. Murrish been there on that day at any time that you saw these photostats? [463—458]

A. I do not believe that Mr. Murrish was there.

Q. You say he was not there; I asked if he had been there? A. Yes, he had been there.

Q. What had taken place during the visit or the presence of Mr. Murrish on that day?

A. Well, we went over a contract which we eventually signed.

Q. What, if anything, did Mr. Murrish do or did Mr. Taylor do with Mr. Murrish?

A. Well, Mr. Taylor had prepared an agreement to be signed by us, which was later on changed or modified; there was some error in its construction as it was drawn up; and I believe that after a little discussion Mr. Taylor asked Mr. Murrish to dictate the contract to the stenographer in his form, as he wants it drawn up.

Q. What did Mr. Murrish do?

A. As I remember, he and Mr. Taylor left the room and went into an adjoining room to dictate this contract to a stenographer.

Q. When next did you see Mr. Murrish?

A. Well, I should say between one-thirty and two o'clock that afternoon.

(Testimony of Rudolph Nenzel.)

Q. When next did you see Mr. Taylor after he left the room with Mr. Murrish?

A. A few minutes afterward.

Q. Where?

A. As I remember, we went into the drafting room at least there was a drafting table in that room, with Mr.—

Q. (Intg.) On what date was this?

A. This was on Wednesday.

Q. April— A. Second.

Q. 1919? A. Yes, sir.

Q. Proceed, please, what took place in the room after Mr. Taylor came in?

A. Mr. Taylor asked Mr. Poole regarding some figures, and Mr. Poole had his mine map, which has been introduced here as Exhibit “Y,” I believe, and Mr. Taylor produced a photostat, which he got out of one of the drawers or filing cabinets, and the first [464—459] thing they done was to transfer the extensions which were on the map to the photostat.

Q. How was it done, what was the process of transferring, describe it fully?

A. They spent a little time looking around for an engineer’s ruler, they couldn’t find any, and just used an ordinary rule, a foot rule or ten-inch rule.

Q. Where were the gentlemen with reference to this drawing table?

A. Mr. Poole was in front of the drawing table, and Mr. Taylor was to his right.

Q. Where were you?

A. I was to the left at the end of the table.

(Testimony of Rudolph Nenzel.)

Q. Were any of you sitting, or were you all standing?

A. We were all standing, as I remember.

Q. Did you look and see what was being done?

A. Well, yes.

Q. Did you hear what was being said?

A. I could not recall what was said any more than that the extensions were transferred from Mr. Poole's map to the photostat.

Mr. THATCHER.—I move to strike out the answer as not responsive; the question was, what was said.

The COURT.—It may go out.

A. Yes, I could have heard them, sure.

Mr. WHEELER.—(Q.) What was Mr. Poole doing in this process of transferring, and what was Mr. Taylor doing?

A. Mr. Poole was measuring off the distances on his map, and Mr. Taylor was placing the extensions on the photostat which he had before him.

Q. Were any computations made by either of these gentlemen in your presence on that day?

A. Yes; Mr. Taylor done some figuring which Mr. Poole placed on his photostat map.

Q. On that occasion was anything said by Mr. Poole to Mr. Taylor [465—460] with reference to there being 60,000 tons of ore in the mine, or indicated by the figures, or otherwise?

A. No, sir.

Q. Was anything said on that occasion, in substance or to the effect that there were 60,000 tons of

(Testimony of Rudolph Nenzel.)

commercial ore in the mines represented on the map—mine or mines represented on the map?

A. No, sir.

Q. Was there anything on that occasion said as to the ore in the mines, mine or mines represented on the map, averaging 1.75 per cent tungstic acid?

A. No, sir.

Q. At what time in the afternoon was the contract Exhibit "C" here offered in evidence annexed by copy to plaintiff's complaint, executed?

A. About 2 o'clock in the afternoon, possibly a little later.

Q. Who was the first party to sign that contract.

A. Mr. Murrish.

Q. What did Mr. Murrish do, if anything, after he affixed his signature to the contract?

A. Left the office.

Q. Did he take any copy of the contract away with him? A. No, sir.

Q. Was the contract executed by either of the other parties thereto prior to the time that Mr. Murrish left the office? A. It was not.

Q. How soon after Mr. Murrish left were the signatures of Mr. Taylor and yourself and Mr. Poole affixed?

A. Immediately after Mr. Murrish left.

Q. When did you leave Denver?

A. I believe we left Denver about 6 o'clock, 5:30 or 6 o'clock.

Q. Did you come directly to Nevada?

A. No, we stopped in Salt Lake.

(Testimony of Rudolph Nenzel.)

Q. Do you recall a trip to San Francisco in the latter part of May or the first part of June, 1919, in which you met Mr. Jackson, [466—461] one of counsel for the plaintiff? A. Yes, sir.

Q. Do you recall that? A. Yes, sir, I do.

Q. How soon after reaching San Francisco, and on what day and date did you first see Mr. Jackson and Mr. Taylor in San Francisco?

A. On Monday up in Mr. Bayless' office.

Q. Monday, what date, do you now recall; I would like to have that date, I suppose there is no question about it? A. June 2d, 1919.

Q. On that occasion do you recall any statement or statements made by Mr. Jackson?

A. Yes, sir.

Q. State what in substance and effect Mr. Jackson said in your presence on that day?

A. Well, he said that we had represented there were 60,000 tons of ore in the mine while we were at Denver, and that Mr. Bancroft's report only shows 19,000, and that therefore they wanted to make a modified agreement with us.

Q. When he made that statement that you gentlemen had represented to Mr. Taylor that there were 60,000 tons of ore in the mine, did you nod your assent thereto? A. I did not ?

Q. Did you orally express assent thereto?

A. I did not.

Q. Did you do anything whatsoever to indicate your assent thereto. A. No, sir.

Q. Did you assent to that statement?

(Testimony of Rudolph Nenzel.)

A. I did not.

Mr. THATCHER.—Object to it as calling for the conclusion; he may tell what he did. I move to strike out the answer of the witness; I didn't have a chance to object before the question was answered.

Mr. WHEELER.—I think it may go out, your Honor.

The COURT.—Very well.

Mr. WHEELER.—(Q.) Did you remain silent on the occasion when [467—462] he made that statement? A. I did.

Q. Why.

Mr. THATCHER.—Object as calling for the conclusion of the witness, and immaterial.

Mr. WHEELER.—I submit, your Honor, where it is attempted to show acquiescence by silence, if there was any occasion for the silence the witness has a right to state.

The COURT.—I will let him state it.

WITNESS.—That morning before we went to the office Mr. Poole, Mr. Murrish, Mr. Jones and myself agreed amongst the—

Mr. THATCHER.—(Intg.) Object on the ground this is a conversation and agreement which took place outside of the presence of the plaintiff, and not binding upon him.

Mr. WHEELER.—I submit that where the question of one's acquiescence in a statement is to be inferred from his silence, that if there was an

(Testimony of Rudolph Nenzel.)

occasion for the silence he can state what it was, the state of his mind.

The COURT.—He is now attempting to relate a conversation that he had with his associates. I will let him say that they agreed not to do it, if that is all there is to it?

Mr. WHEELER.—That is all I care about.

WITNESS.—We agreed not to say a word, but to hear Mr. Taylor's proposition.

Mr. WHEELER.—(Q.) On any occasion after this statement had been made by Mr. Jackson, did Mr. Jackson again refer to the same matter?

A. He did.

Q. When? A. That afternoon.

Q. What did Mr. Jackson say on that occasion?

A. He said that we consented through silence, and some Latin word, I don't know.

Q. Who was present when he said that? [468—463]

A. Mr. Jones, Mr. Poole, Mr. Murrish, myself, Mr. Taylor and Mr. Bayless.

Q. What did you say when he said that?

A. I told him that I did not consent by silence, and told him that I did not understand his words when he used that foreign language which he used.

Q. What language did he use, do you know; how did he put it, do you know now what the words were that he used?

A. Acquiescence, or something like that?

Q. You said that to him, that you didn't understand the language that he had used, and you refer

(Testimony of Rudolph Nenzel.)

to his words acquiescence by silence? A. Yes.

Q. Were these other gentlemen present, and did they hear you say that? A. Yes, sir.

Q. What did Mr. Murrish say?

A. He said that he did not consent by being silent.

Q. What did Mr. Jones say?

A. Mr. Jones I don't believe said anything.

Q. What did Mr. Poole say?

A. He said that he did not make such a representation.

Q. Was Mr. Jones at Denver on the occasion of your visit there with Mr. Poole and Mr. Murrish?

A. He was not.

Mr. WHEELER.—You may cross-examine.

Cross-examination.

Mr. THATCHER.—(Q.) Mr. Nenzel, you went to Denver after some correspondence with Mr. Taylor, did you? A. Yes, sir.

Q. I call your attention to that letter, Plaintiff's Exhibit 12, and ask you if you ever saw that before? A. Yes, sir, I have.

Q. Did you read that letter? A. Yes, sir.

Q. About the time it was received in Lovelock? [469—464] A. Yes, sir.

Q. Called it to Mr. Friedman's attention, did you? A. Yes, sir.

Q. Call it to any of the other defendants' attention?

Mr. WHEELER.—Object to it as not cross-examination.

(Testimony of Rudolph Nenzel.)

The COURT.—It don't seem to me that this is cross-examination, is it, Mr. Thatcher?

Mr. THATCHER.—I am rather doubtful of it myself, if the Court please; the direct examination was so limited that I was not sure about that question. (Q.) Well, you went on to Denver anyway, did you, Mr. Nenzel? A. Yes, sir.

Q. And arrived there on Sunday, the 30th?

A. Yes, Sunday, May 30th.

Q. And on Sunday, May 30th, you were in conference with Mr. Taylor, yourself, Mr. Poole and Mr. Murrish were in conference with him?

A. Yes, sir.

Q. At that time was anything said by any of you as to the tonnage in the mine, or amount of ore in it? A. No, sir.

Q. And was anything said as to what the ore would run? A. There was not.

Q. Nothing said. Was anything said as to the amount of development that had been carried on in the mine—on Sunday I am talking about?

A. Yes, Mr. Poole showed Mr. Taylor his mine map on that day—Exhibit “Y.”

Q. And did he show him how much work had been done since the Bancroft report?

A. Yes, that was noted on the map.

Q. That was noted on the map at that time?

A. Yes, sir.

Q. That was since the first Bancroft report?

A. Yes, sir.

Q. And no statement was made at that time by

(Testimony of Rudolph Nenzel.)

anybody, especially by yourself, Mr. Murrish, or Mr. Poole, as to whether the mine ran high or low, one per cent, another per cent, or anything of that kind? A. No, sir. [470—465]

Q. And nothing was said as to whether or not there was any tonnage, whether there was ten tons or 60,000 tons in the mine?

A. No, sir, there was not.

Q. Now on Tuesday was anything said by yourself, or Mr. Poole or Mr. Murrish as to what the mine assayed at any point at all?

A. There was not.

Q. Or was anything said at that time as to whether it contained any tonnage at all, whether there was any ore in sight? A. No, sir.

Q. Was anything said on Monday or Tuesday by either of you three to Mr. Taylor to the effect that any ore, commercial ore, was blocked out or in sight or developed, or even indicated in the mine?

A. No, sir.

Q. As a matter of fact, on Monday and Tuesday you never discussed the question of whether the mine had one ton or 60,000 tons, is that correct?

A. Yes, sir.

Q. Or whether it ran no per cent or ten per cent in tungsten? A. That wasn't discussed.

Q. Never discussed it. On Tuesday now, what happened; was there any discussion then as to the mine values? A. No, sir.

Q. None at all. Was there anything said at that

(Testimony of Rudolph Nenzel.)

time as to whether or not there was one ton or ten ton or 60,000 tons in the mine, on Tuesday?

A. There was a discussion there with reference to making a deal.

Q. Well, I mean was there any statement made by yourself or Mr. Poole or Mr. Murrish at that time as to whether this mine contained one ton or 60,000 tons of ore? A. No, sir.

Q. Tonnage was never mentioned at that time as to what the mine contained, as far as you folks were concerned? A. No.

Q. Did either one of you at any time that you were there state to [471—466] Mr. Taylor that the mine would run 1.75 per cent tungsten?

A. No, sir.

Q. Did you give him any figure at all at that time as to what it would run, the ore in the mine?

A. No, sir.

Q. Then my understanding of your testimony is that on these three days, Monday, Tuesday and Wednesday, the 30th, 31st and 1st, that neither one of you, that is, to your knowledge, ever told Mr. Taylor that this mine contained any number of tons, or any percentage of tungsten; that it was not mentioned at all as far as you folks were concerned? A. It was not.

Q. Never mentioned. And then on Wednesday it was not mentioned until after Mr. Murrish and Mr. Taylor had started to drafting the contract?

A. Yes, sir.

Q. And then after you had agreed on the deal,

(Testimony of Rudolph Nenzel.)

and Mr. Murrish was drawing the papers, then there was some general discussion with reference to tonnages and percentages?

A. Between Mr. Poole and Mr. Taylor, yes, sir.

Q. Between Mr. Poole and Mr. Taylor?

A. Yes, sir.

Q. And that resulted in the map or photostat map, and the other which you have here testified?

A. Yes, sir.

Q. But all of that took place after you had agreed on the deal and Mr. Murrish was drawing the contract? A. Yes, sir.

Q. What time did you get there on Wednesday morning?

A. As well as I remember, it was around nine-thirty or ten o'clock.

Q. Might it not have been ten-thirty?

A. No, it wasn't that late.

Q. If Mr. Poole said it was ten to ten-thirty he might have been mistaken?

A. He might have been.

Mr. COOKE.—I object to this witness passing on somebody else's testimony. [472—467]

The COURT.—The objection is good.

Mr. THATCHER.—(Q.) How long did you stay?

A. We stayed till lunch time.

Q. Went out to lunch? A. Yes.

Q. Did Mr. Taylor go with you? A. No, sir.

Q. What time did you come back?

A. Well, I think it was between one-thirty and two o'clock.

(Testimony of Rudolph Nenzel.)

Q. What time did you go out to lunch—twelve?

A. Twelve, maybe before twelve, around 12 o'clock.

Q. How long were Mr. Taylor and Mr. Murrish out of the room on the contract?

A. I don't think they were over fifteen minutes, ten or fifteen minutes.

Q. Then Mr. Taylor came back? A. Yes.

Q. And then the conversation and the platting took place? A. Yes, sir.

Q. And this took place in the room where the drafting board was? A. Yes, sir.

Q. How did they stand?

A. Mr. Poole stood on the width of the table, and Mr. Taylor stood on the right, and I stood on his left.

Q. Now, how is that, I didn't get that?

A. It was a table, the drawing table, the same as this would be the drawing table (illustrating), Mr. Poole was here, David—David Taylor was over here, and I was standing at this end.

Q. Where was Mr. Murrish during these conversations?

A. Mr. Murrish left as soon as he got through.

Q. He didn't come back into the room at all?

A. He did not.

Q. Do you know when he left? A. I do not.

Q. Do you know how long he was dictating the contract? A. I do not.

Q. After he went into the stenographer's room

(Testimony of Rudolph Nenzel.)

to dictate the contract, [473—468] you didn't see him at all? A. No, sir, I did not.

Q. Now what kind of a drafting table was this, Mr. Nenzel? A. Oh, I am not familiar—

Q. Just describe it, tell us what kind of a table it was?

A. The thickness of the top was I should say inch or inch and a half, somewheres along there.

Q. How high from the ground?

A. Possibly standing about that high. (Illustrating.)

Q. Higher than this table? A. Yes.

Q. Can you give us a diagram of the Taylor offices, and where the drafting table was?

A. I don't know whether I can or not.

Q. Suppose you try. (Witness draws diagram on paper.)

A. There was a hall down this way, and a room in here; as I remember, this was the office where most of the conference took place.

Mr. WHEELER.—Try to indicate it in some way so the record will show it.

WITNESS.—This I call west.

Mr. THATCHER.—(Q.) It don't make any difference which direction. Is that a hall there?

A. An anteroom of some kind.

Q. A hall and rooms on each side, that is it, isn't it? A. Yes.

Q. And one, two, three on this side?

A. I am sure I don't know.

Q. On this side how many rooms are there?

(Testimony of Rudolph Nenzel.)

A. I don't know that.

Q. The room you had most of your conferences in is marked number one; now where was the stenographer's room?

A. Well, as I remember, there was a girl working there, and there was a girl at her desk out here in the hallway, or over there; I don't remember just exactly how it was; in the hallway I believe there was a little settee there for those calling to sit down.

Q. Where was the drafting room? [474—469]

A. As I remember it was over here. (Indicating on diagram.)

Q. Mark that number 3. And you say the stenographer was here; is that correct? A. No.

Q. Mark that number 2.

A. No, she wasn't in sight; there was one girl working in this hallway or anteroom, and I think there was a girl working in here. (Indicating on diagram.)

Q. Mark 4 and 5 the two girls. (Witness marks the points on the diagram.) Four and five represent the places where the girls were; now where was the drafting board?

A. As I remember, it was in number three.

Q. In number three? A. Yes.

Q. Where was Mr. Bancroft's office?

A. Mr. Taylor told us this was Mr. Bancroft's office, and apologized—

Q. That was number one? A. Yes.

Q. Was there a drafting board in number one?

A. No, sir.

(Testimony of Rudolph Nenzel.)

Q. Were there any drawers in the drafting table?

A. I could not say.

Q. After Mr. Murrish left how long was it before you saw the contract?

A. If I remember, the contract was completed about 2 o'clock, shortly after we got there in the afternoon.

Q. Mr. Murrish dictated it, and left, and you folks got it from the stenographer; is that correct?

A. Mr. Taylor brought it.

Q. Mr. Taylor brought it in from the stenographer's room?

A. He brought it in and handed it to us.

Q. Was the contract read at that time?

A. Yes.

Q. Was it discussed any further, or just signed?

A. No, sir, Mr. Murrish read it, said it was all right, and signed it.

Q. Mr. Murrish read it? A. Yes. [475—470]

Q. I thought that Mr. Murrish didn't come back?

A. In the afternoon, certainly he came back for the purpose of signing the contract.

Q. Did he read it over after he came back?

A. Yes, sir.

Q. How long were you there in the afternoon, do you recollect?

A. Possibly an hour, or half hour.

Q. Were there any other remarks made at the time of signing the contract?

A. After we got through signing the contract, I asked Mr. Taylor for an advance of \$10,000, and if

(Testimony of Rudolph Nenzel.)

he granted it we would give him the bonus of 5,000 shares of stock, and he said that was all right.

Q. And gave you the ten thousand?

A. No, as I remember, we drew on him as soon as I got back to Lovelock, or he gave me a check and I cashed it.

Q. And that was an advance without first delivering the security of concentrates under the contract?

A. Yes, sir.

Q. Is this the mine map which was there that time? (Hands to witness.)

A. Yes, sir.

Q. Did you look it over that time?

A. Casually, yes.

Q. Just casually? A. Yes, sir.

Q. Where did this map come from, do you know?

A. Well, Mr. Poole brought it to Denver.

Q. Mr. Poole brought it? A. Yes.

Q. Where did Mr. Poole get it, did you deliver it to him? A. I did not.

Q. Do you know where he got it?

A. Had an engineer make it.

Q. Had an engineer make it? A. Yes, sir.

Q. When did he have the engineer make it, just before you left? A. The map itself?

Q. Yes.

A. No, I believe that was made shortly after we [476—471] started to operate the property.

Q. Well, what part did the engineer make just before you left and went on the Denver; do you

(Testimony of Rudolph Nenzel.)

know whether he made any part of it just before you went?

A. Yes, there was some lead pencil extensions on various levels here, I could not tell you which ones, or how far they were extended.

Q. Were they on the map when you went to Denver? A. Yes, sir.

Q. Didn't you testify a few moments ago that those lead pencil extensions were made after you got to Denver? A. Not on this map.

Mr. WHEELER.—I submit that is not a fair question, or a fair method of examination.

Mr. THATCHER.—I don't think I am unfair to the witness in a matter of that kind. May I have the question?

(Discussion.)

The COURT.—If there is an objection that the question is unfair, I think the record should be read to show just exactly what the witness did say. If you want that rule enforced during the trial I am perfectly willing to enforce it.

Mr. THATCHER.—That is what I did this morning. That was a mere slip in repeating the question in the form I did, if the Court please; I didn't intend to ask an unfair question.

Q. When you got to Denver and on the 2d of April, what maps were used by Mr. Poole and Mr. Taylor?

A. Mr. Poole had this mine map and Mr. Taylor had a photostat.

(Testimony of Rudolph Nenzel.)

Q. Now what did they transform or transcribe from one map to another?

A. They transferred from the mine map which Mr. Poole had on to the photostat which Mr. Taylor had, the extensions of the development work which was put on the mine map by Mr. Huntington before we left Lovelock for Denver. [477—472]

Q. And those were given by Mr. Poole to Mr. Taylor at that time? A. Yes, sir.

Q. Do you know whether or not they had been called to Mr. Taylor's attention previous to that time? A. They were on Sunday.

Q. On Sunday were they scaled off and drawn on to the mine map, Exhibit "Y"?

A. They were already on there when we brought the map to Denver.

Q. Do you recollect who you represented on that trip to Denver?

A. I had power of attorney—I believe the contracts would show who I signed for.

Q. The powers of attorney show who you represented at that time? A. Yes.

Q. Did you also represent the mine?

A. I wasn't authorized by any one.

Q. Did the mine pay your expenses on that trip?

A. Yes, sir.

Q. Mr. Poole's also? A. Yes, sir.

Q. And Mr. Murrish's? A. Yes, sir.

Redirect Examination.

Mr. WHEELER.—(Q.) You spoke of offering a

(Testimony of Rudolph Nenzel.)

bonus of 5,000 shares to plaintiff Taylor for an advance or loan to the company of \$10,000?

A. Yes, sir.

Q. Did he subsequently advance or loan to the company \$10,000? A. Yes, sir.

Q. Did he subsequently receive his bonus?

A. Yes, sir.

Q. That bonus consisted of 5,000 shares of stock?

A. Yes, sir.

Q. Apart from the 62 per cent of that stock that is here involved, do you know whether or not that was the only stock that Mr. Taylor owns or ever has owned in the defendant corporation?

A. Yes, sir, I believe it is.

Q. That is the 5,000 shares standing in his name at the present [478—473] time on the books of the company? A. Yes, sir.

Mr. WHEELER.—That is all.

Recross-examination.

Mr. THATCHER.—(Q.) By the way, Mr. Nenzel, are you a director in the corporation?

A. I am.

Q. And have been since its organization?

A. No, not since its organization.

Q. Since when?

Q. I could tell you by referring to the minute books.

Q. Well, what office do you hold?

A. Secretary.

Q. Will you refer to the book and tell me how

(Testimony of Rudolph Nenzel.)

long you have been director and how long secretary of this company, Nevada Humboldt Tungsten Mines Company, and that will be all.

Mr. THATCHER.—If the Court please, I want to offer in evidence the sketch made by the witness as to the Taylor offices.

Mr. COOKE.—Explanatory of his evidence?

Mr. THATCHER.—Explanatory of his evidence.

The COURT.—It will be admitted.

(The diagram is marked Plaintiff's Exhibit No. 50.)

Mr. THATCHER.—Outside of that, I have nothing.

WITNESS.—Since the 26th day of November, 1917.

Q. You were secretary and director since the 26th day of November, 1917, up to date? A. Yes.

Mr. WHEELER.—Who contributed that 5,000 shares of stock that went to Mr. Taylor's bonus?

Mr. THATCHER.—Object as immaterial.

The COURT.—You may answer the question.

A. All of the stockholders in proportion to the amount of stock they held.

Q. And was that indebtedness or loan of \$10,000 ever repaid to Mr. Taylor?

A. It was. [479—474]

(By Mr. COOKE.)

Q. In this conversation at Denver, Mr. Nenzel, did you hear the latter of Mr. Bancroft making an examination discussed between Mr. Poole and

(Testimony of Rudolph Nenzel.)

Mr. Taylor, or was it discussed by any of you during the various conferences you had there?

A. Mr. Poole discussed with Mr. Taylor regarding Mr. Bancroft making an examination, but I don't remember what discussion they had.

Q. You mean you know it was discussed, but you don't recall what was said?

A. No, sir, I do not.

Q. Do you recall whether the matter of the Morrin pannings was discussed, and what degree of reliability, if any, should be attached to those?

A. Mr.—

Mr. THATCHER.—(Intg.) Just a minute. You can answer that yes or no.

Mr. COOKE.—Answer it yes or no if you heard it discussed. A. I did.

Q. Go on and state what was said, and who did the talking.

A. When Mr. Poole showed Mr. Taylor the mine map—

Q. That is Exhibit "Y"?

A. Exhibit "Y," yes, sir, Mr. Poole explained to Mr. Taylor that the footages of development were accurate, as he could vouch for Mr. Huntington's accuracy in making surveys, but that the assays thereon, or values, were estimates made by Ben Morrin and placed on the map by Mr. Huntington, and Mr. Taylor should take them for what they were worth.

Q. Do you remember what, if any reply Taylor made to that?

(Testimony of Rudolph Nenzel.)

A. He said if they were untrue it would affect Mr. Poole personally in the future, or words to that effect.

Q. Were you down in the mine in the course of your connection with the company; did your duties require you to enter the mine, examine [480—475] it, and know anything about any mine workings? A. I have been down there, yes.

Q. Are you a miner? A. I am not.

Q. What is your business, and what has it been? A. Bookkeeper.

Q. Do you know anything about mining or measuring ore in a mine? A. I do not.

Q. And determining ore from assays, or anything of that sort? A. No, sir.

Q. Had you been down the mine frequently during the period from say January 1st, 1918, to April 1st, 1919?

A. I was not; I might have been down once or twice.

Q. Ever do any panning or testing in any way when you would go down there?

A. Yes, I have made some pannings.

Q. How often had you met Mr. Taylor prior to this present meeting, this meeting of April 1st, 1919? A. I met him once.

Q. Where? A. In Denver, Colorado.

Q. About what time was that?

A. That was May, May 30th, 1919, to April 2d, 1919.

(Testimony of Rudolph Nenzel.)

Q. Prior to April 1st, 1919, had you met Mr. Taylor? A. Yes, in San Francisco.

Q. And when was that?

A. That was in January.

Q. That is in connection with the January 16th contract, when that was under consideration?

A. Yes, sir.

Q. And was that the extent of your acquaintance with him down to April 1st, you had only one meeting with him? A. Yes, sir.

Mr. COOKE.—I think that is all.

Mr. THATCHER.—(Q.) You made some pan-nings down in the mine, did you? A. Yes, sir.

Q. Ever have any assays made? A. No, sir.

Q. Never had an assay? A. No, sir.

Mr. THATCHER.—That is all.

Mr. WHEELER.—That is all. [481—476]

Testimony of H. J. Murrish, for Defendants.

H. J. MURRISH, one of the defendants, called as a witness on behalf of the defendants, after being sworn, testified as follows:

Direct Examination by Mr. WHEELER.

Q. What is your profession, Mr. Murrish?

A. I am an attorney of law.

Q. Where are your offices?

A. Lovelock, Nevada.

Q. How long have you been practicing in Lovelock, Nevada? A. Since 1912.

(Testimony of H. J. Murrish.)

Q. Were you present in Denver, Colorado with Mr. Poole and Mr. Nenzel on the 30th and 31st days of March and the 1st and 2d days of April, 1919? A. I was.

Q. Were you in the office of David Taylor on Sunday, Monday, Tuesday and Wednesday, March 30th, March 31st, April 1st, and April 2d, 1919?

A. I was.

Q. Did you on any occasion in the office of David Taylor, or elsewhere, in the presence of the gentlemen named, or otherwise, say to David Taylor that there was blocked out, in sight and ready for mining and reduction into concentrates over 60,000 tons of scheelite ore which would carry an average of 1.75 per cent tungstic acid? A. I did not.

Q. Did you say that there were over 60,000 tons of scheelite ore in the said mine? A. I did not.

Q. Did you say that there was that quantity of ore in sight? A. I did not.

Q. Did you say that it was blocked out?

A. I did not.

Q. Did you say that it was ready for mining and milling and reduction into concentrates?

A. I did not.

Q. Did you on any of those occasions, on any or either of those [482—477] days, make a statement to the said David Taylor, which in substance or effect was that there were 60,000 tons, or any other quantity of ore in the mine of the defendant, Nevada Humboldt Tungsten Mines Company?

(Testimony of H. J. Murrish.)

A. No.

Q. Did you on any of those occasions say to the said David Taylor that there was in that mine any quantity of ore whatsoever that would go 1.75 per cent tungstic acid, or would average that?

A. No, sir.

Q. On any occasion during that visit to Denver in 1919, did Mr. Poole make a statement in your presence to the said David Taylor to the effect that there was 60,000 tons of ore blocked out, in sight and ready for mining and reduction into concentrates? A. No, sir.

Q. On any occasion in your presence during that visit did Mr. Poole make a statement to David Taylor to the effect that there was any quantity of ore in said mine that would carry an average of 1.75 per cent tungstic acid? A. No, sir.

Q. Did he make any statement in your presence, he the said Poole to the said Taylor, to the effect that there was any quantity of ore in the said mine which would carry an average of 1.75 per cent tungstic acid? A. No, sir.

Q. Did he say to the said Taylor in your presence that there was in that mine any quantity or tonnage of ore whatsoever? A. No, sir.

Q. Did Mr. Nenzel on any occasion make any statement of the kind or character embraced in my questions just asked you concerning Mr. Poole?

A. No, sir.

Q. Did Mr. Nenzel make any statement in sub-

(Testimony of H. J. Murrish.)

stance or to the effect indicated in my previous questions regarding Mr. Poole, as to the said matter of the quantity of ore, and as to the matter of its [483—478] averaging 1.75 in tungstic acid, or either as to the quantity of ore or as to the per cent in tungstic acid? A. Not in my presence.

Q. Did Mr. Poole say to Mr. Taylor at any time during that visit to Denver in 1919, in your presence, that there was over 60,000 tons of ore developed within the or any blocks indicated by the or any lines or pencil lines shown upon the map plate 5, annexed to Exhibit 15?

A. I never saw plate 5 annexed to Exhibit 15.

Q. Answer the question directly, please?

A. No, sir.

Q. Did he make any statement to the effect that there was any quantity of ore whatsoever indicated within blocks on the said Exhibit 5, which would average over 1.75 per cent tungstic acid?

A. No, sir.

Q. With reference to plate 5 annexed to Exhibit 15, have you seen that since you have been in the courtroom during the progress of this trial?

A. I haven't examined it, I have seen it here.

Q. Examine plate 5 annexed to Exhibit 15, and state whether or not you have ever seen that plate before? A No, sir, I have not.

Q. Did you see that plate, or any part or portion of it, in Denver in the year 1919? A. No, sir.

Q. Was any part or portion of that plate pre-

(Testimony of H. J. Murrish.)

pared in your presence in Denver in the year 1919, either by Mr. Poole, Mr. Taylor, or by any other person or persons? A. No, sir.

Q. Did Mr. Poole on that or any occasion in Denver, in 1919, in your presence, say to Mr. Taylor there was 60,000 tons of ore that will average over 1.75 per cent, developed in the mine, referring to the mine of the defendant, Nevada Humboldt Tungsten Mines Company?

A. No, sir.

Q. Was any part or portion of such statement made in your presence to Mr. Taylor by Mr. Poole?

A. No, sir. [484—479]

Q. Or by Mr. Nenzel? A. No, sir.

Q. Was there any opinion expressed by you or in your presence, either by Mr. Poole or by Mr. Nenzel, in substance or to the effect that 60,000 tons of ore was probably not the maximum amount of ore that might be expected in the mine?

A. No, sir.

Q. Were you in San Francisco the early part of June, 1919? A. I was.

Q. On that occasion did you have any conversations with Mr. Taylor, or Mr. Jackson in the presence of Mr. Taylor? A. I did.

Q. State fully and in their sequence, please, what took place at those respective conversations?

A. I met Mr. Jackson and Mr. Taylor in the office of Mr. Bayless, an attorney in San Francisco, on the morning of June 2d, I think it was, it was

(Testimony of H. J. Murrish.)

Monday morning at any rate, in company with Mr. Nenzel, Mr. Poole and Mr. Jones; we went there pursuant to an engagement that we had previously made with them, and Mr. Taylor told us that Mr. Jackson would speak for him. Mr. Jackson opened the conversation by stating that "You people told Mr. Taylor in Denver that there was 60,000 tons of ore in the mine, now Mr. Bancroft reports that there are only 19,000 tons there, so Mr. Taylor does not feel justified in putting the money of his friends into this proposition on the basis of the present contract, and he will have to have it modified." "Now," he said, "we are willing to put up \$75,000 to pay creditors, and we will pay the rest of the debts as soon as the ore is developed that you stated was in the mine."

Q. When Mr. Jackson on that occasion in your presence made the statement with regard to the representations to Mr. Taylor as to the tonnage in the mine, what did you do? A. Nothing.

Q. Did you nod your assent? A. No, sir.

Q. Did you express your assent? A. I did not.

Q. Why? [485—480]

Mr. THATCHER.—Objected to as calling for the conclusion of the witness.

Mr. WHEELER.—(Q.) Did you make any reply whatever to that statement? A. None whatever.

Q. Why not?

Mr. THATCHER.—Objected to as calling for the conclusion of the witness, and immaterial.

(Testimony of H. J. Murrish.)

The COURT.—He need not detail any conversation in the matter; he can answer it otherwise.

A. We had agreed before going to the meeting that there would be no discussion of any matter on our part, that we would simply listen to Mr. Taylor's proposition, and retire and consider it, returning later to discuss the matter with him.

Mr. WHEELER.—(Q.) Was there any word used by Mr. Jackson on that occasion, such as that you had misrepresented to Mr. Taylor, or that you had fraudulently misstated to Mr. Taylor anything?

A. No, sir.

Q. Have you stated all that took place at that meeting, in substance? A. In substance, yes.

Q. When next did you meet?

A. As I recall, it was after lunch on the same day.

Q. What took place when you met on the same day after lunch?

A. Mr. Taylor again started the conversation—

Mr. COOKE.—Who?

A. Mr. Jackson; I don't recall whether he said you admitted or you stated—

Mr. THATCHER.—(Q.) Is this the afternoon of Monday?

A. The afternoon of Monday, to my best recollection. (Contg.) To our folks, stated that there was 60,000 tons of ore in the mine; and I then took issue with Mr. Jackson; and I said, "I made no such [486—481] statement as that," and he said, "Yes, you did," he says, "Your silence was assent." I said, "My silence was not assent in that case be-

(Testimony of H. J. Murrish.)

cause I never made such a statement," and the minute I finished Mr. Nenzel got up, and he said, "I never made such a statement as that either," he says, "I don't understand your terms, but," he says, "I never made such a remark as that"; and while Mr. Nenzel was still talking, Mr. Poole got up and he started in a gentlemanly manner to enter into a discussion, and to—

Mr. WHEELER.—(Q.) Well, what did he say?

A. That he had never made any such statement as that to Mr. Taylor, that there was 60,000 tons of ore in the mine.

Q. What else took place on that day in the afternoon?

A. Well, there followed a discussion then about the modified form of contract, and we stated that it would be absolutely impossible for us to agree to any modification if it did not arrange for the payment of all our debts.

Q. Proceed; tell what was said and done.

A. Well, as I recall it, that was all there was to it; they argued this modification they wanted, and we argued that we could not consider anything that didn't pay all of our debts.

Q. When did you next meet?

A. The next morning.

Q. What took place on that occasion?

A. Well, the next morning—

Q. Which was what day of the week?

A. Tuesday morning. I am not absolutely positive about the sequence of these, because there might

(Testimony of H. J. Murrish.)

have been two meetings in one afternoon, but I am following the sequence of the meetings, and I think it was Tuesday morning.

Q. Give us the first thing you recall?

A. The first thing Mr. Nenzel used as argument was if they only paid \$75,000 worth of our debts we would have no money to operate [487—482] the mine, and it was preposterous to consider such a proposition; then Mr. Taylor said under those circumstances he would advance an additional \$10,000 to work the mine; and Mr. Jackson, as I remember had that morning a sheet of paper on which he had the modifications that he wanted us to assent to.

Mr. WHEELER.—We ask counsel on the other side to produce a sheet of paper such as is described by the witness.

Mr. THATCHER.—We will see if we can find it.

Mr. WHEELER.—This, as I understand it, is the first paper presented, is it?

A. The first paper, yes; it is a single sheet.

Mr. WHEELER.—A single sheet of paper upon which you first outlined your terms, and which preceded the draft of contract.

Mr. JACKSON.—(Q.) Was it in my handwriting?

WITNESS.—Part of it was in typewriting, and part of it in some one's handwriting; I am not familiar with it.

(A short recess is taken at this time.)

Mr. WHEELER.—(Q.) You spoke of Mr. Jackson having a sheet of paper on which was set forth

(Testimony of H. J. Murrish.)

the modifications he wished you to assent to; I hand you a document and ask you whether or not that is the paper referred to by you? A. It is.

Mr. WHEELER.—(Q.) We offer it in evidence, and ask that it be marked Defendants' Exhibit "Z."

(The paper is admitted, and marked Defendants' Exhibit "Z.")

Mr. WHEELER.—(Q.) I observe some handwriting upon the paper Exhibit "Z," whose handwriting is that, if you know? A. I do not know.

Q. Was it there when the paper came into your possession? A. It was.

Q. How and when did the paper come into your possession?

A. It was in use during the discussion, and upon the termination [488—483] of the discussion, Mr. Nenzel took it away with him.

Q. That was on what day?

A. On Tuesday, to the best of my recollection.

Q. What took place at the next discussion?

A. That wasn't all that happened at that one.

Q. Proceed, please.

A. I asked Mr. Taylor this question: I said, "Are you going to exercise your option of April 2d?" He said, "Yes, by paying \$75,000 of the debts, and paying the rest when the mine is developed." "Then," I said, "you are not going to exercise your option?" and he said, "Yes, by paying \$75,000 of the debts and paying the rest when the mine is developed," and I repeated, "Then you are not

(Testimony of H. J. Murrish.)

going to exercise your option?" and he said, "Yes, by paying \$75,000 on the debts and the balance when the mine is developed." So I got up and left the meeting. That afternoon they asked for another conference, and we went back and had another general discussion, and at that meeting I asked them—we discussed the matter of creditors, and we stated we would have to consult our creditors before we did anything, and Mr. Taylor asked to go along with us to see our creditors, and we told him that we didn't figure that he had any business with them, that they were our creditors, and not his; and we discussed that at considerable length, and then finally I asked Mr. Taylor if he would prepare an exact statement of what he wanted to show, that we could submit to our creditors.

Q. To whom, to Mr. Taylor or Mr. Jackson?

A. I don't recall that I addressed it to either one of them, but most likely to Mr. Taylor, because he was the principal. At any rate, Mr. Jackson stated that they would submit to us a detailed plan of what they wanted, the modification of the April 2d option that they insisted upon; and there was nothing further, as far as I was concerned, until Friday, right after lunch; at that time Mr. [489—484] Nenzel, Mr. Poole, Mr. Jones and myself were going to a ball game; Mr. Jones and I were in a taxi outside of the Palace Hotel waiting for Mr. Nenzel and Mr. Poole; and after waiting quite a while I got out and went in to see why the delay, and Mr. Nenzel and Mr. Poole were talking to Mr. Taylor

(Testimony of H. J. Murrish.)

and Mr. Jackson, and they all came out to the taxi, and said they thought that was a pretty poor time to be going to ball games, that we ought to get together and try to come to some agreement; I said as far as I was concerned there was no agreement we could come to; so Mr. Jones and I went on to the ball game. When we returned, Mr. Nenzel handed me a copy of the proposed contract.

Q. I hand you Plaintiff's Exhibit Number 16, and ask you if the document so handed to you is that identical document, or whether or not that, if you can recall it, is substantially the same document?

A. I should say not; this is dated April 2d, and it is executed.

Q. Oh, I beg your pardon; I have the wrong agreement. I hand you Plaintiff's Exhibit 17, and will ask you some questions with reference to that. (Hands to witness.) A. That is a copy of it, yes.

Q. You say it was handed to you by Mr. Nenzel?

A. Yes.

Q. What did you do with it, when the copy of Exhibit 17 was handed to you?

A. I glanced it over. When Mr. Nenzel handed it to me he brought me a message from Mr. Jackson.

Q. What did Mr. Nenzel say?

A. That Mr. Jackson wanted me to look it over and—

Mr. THATCHER.—I object to what Mr. Nenzel said.

The COURT.—I think that objection is good.

(Testimony of H. J. Murrish.)

Mr. WHEELER.—We will connect it up, your Honor, if it is admitted subject to objection. [490—485]

Mr. THATCHER.—With that understanding, with the right to strike.

Mr. WHEELER.—Yes.

A. (Contg.) And said Mr. Jackson referred it to me to put on any additions that we wanted, or to make any corrections or modifications of it, and that he asked that we all come up to Mr. Bayless' office after dinner that evening.

Q. Did you go to Mr. Bayless' office?

A. We did, but not that evening.

Q. When?

A. Right immediately; Mr. Nenzel called up the office—that was before dinner—and asked if we could be seen then.

Q. Did you take the document, a copy of Exhibit 17, with you?

A. We did, Mr. Nenzel, Mr. Poole and myself; Mr. Jones was not present.

Q. Who was present on that occasion?

A. Mr. Nenzel, myself, Mr. Taylor and Mr. Jackson; I am not positive as to whether Mr. Bayless was there or not, but I think he was.

Q. What was said on that occasion; give the substance?

A. Mr. Taylor asked me if there were any changes that I wanted made in the agreement, and I said absolutely none; that in submitting that proposition

(Testimony of H. J. Murrish.)

to the creditors I wanted it to be wholly Mr. Taylor's proposition.

Mr. THATCHER.—I move to strike out "that in submitting that proposition to the creditors I wanted it to be wholly Mr. Taylor's proposition." Is that your statement?

A. I told Mr. Jackson; he asked me to make the changes, and I told him why I had none to make.

Mr. THATCHER.—I withdraw the objection.

WITNESS.—I then asked him if that was the form in which he [491—486] wanted it submitted, and he said that if we had no objections that there were one or two other clauses that he would like to put into the contract, and that if we would leave the copy with him he would make the changes; and Mr. Nenzel said that he would not leave the copy, but that Mr. Jackson could make the changes and leave them in Mr. Nenzel's hotel box in the Palace Hotel, when he had finished them; and we then left the meeting.

Mr. WHEELER.—(Q.) Were any changes, or proposed changes, or documents relating thereto, subsequently left in the hotel box?

A. There were.

Q. Examine the two sheets which I now hand you, and state whether or not that is the original document so left in the box, to which you referred?

A. That is one of the copies that was left in the box.

Q. Two copies were left in the box?

A. There were.

(Testimony of H. J. Murrish.)

Mr. WHEELER.—We offer the document in evidence.

(The document is marked Defendants' Exhibit "A-1.")

Mr. WHEELER.—(Q.) This was on Friday night, as I understand you?

A. This was on Friday about 6 o'clock.

Q. When next did you see the plaintiff or his counsel, or either of them?

A. I saw them about noon the next day.

Q. Where?

A. In the office of Freitag & Ainsworth.

Q. Up to this time, at any stage of the proceedings, had you or had either of the other defendants said in your presence, that you or they or either of them, agreed and assented to the proposed contract, Plaintiff's Exhibit 17, or Plaintiff's Exhibit 17 as modified by the addendum, Defendants' Exhibit "A-1"? A. No, sir.

Q. Had you in fact assented thereto?

A. No, sir.

Q. Had you, or had any one in your presence at any time prior to this meeting that Saturday, agreed to David Taylor or to his counsel, [492—487] Mr. Jackson, that you would advocate the adoption of that agreement in the creditors' meeting? A. No, sir.

Q. When you went to the creditors' meeting what took place; did you see Mr. Jackson or Mr. Taylor there?

A. I did, but not at the opening of the meeting.

(Testimony of H. J. Murrish.)

Q. Did you see Mr. Bayless, one of Mr. Taylor's counsel there? A. He was there.

Q. All during the meeting?

A. All during the meeting.

Q. State what took place during the meeting.

Mr. THATCHER.—I object, and move to strike out his conclusion that Mr. Bayless was there as attorney for Mr. Taylor. If they want to show Mr. Bayless was there, I don't object, but when they assume he was there as Mr. Taylor's attorney, I do object to that.

The COURT.—That may go out; Mr. Bayless may remain; "one of Mr. Taylor's counsel" may be stricken.

Mr. WHEELER.—(Q.) Proceed, please; what took place at the meeting?

A. I called the meeting of the creditors to order, and stated briefly the object of the meeting; that we were indebted in a large sum of money to them, and that our indebtedness was rapidly maturing, and that we were anxious to pay our debts, or to secure the creditors in the payment, and that we were dealing with Mr. Taylor, who had submitted a proposition to us concerning the mine, but that we felt we were in the hands of our creditors, that if not legally, we were morally, the property was theirs, and that we would be governed wholly by whatever action they took at the meeting. I then told them that Mr. Poole would address them on the state of our affairs, and the chances and the likelihood of our liquidating our debts. Mr. Poole

(Testimony of H. J. Murrish.)

made such a statement, after which I read the proposed contract with the addenda. [493—488]

Mr. COOKE.—That is this Exhibit 17?

A. That is Exhibit 17.

Mr. WHEELER.—(Q.) And the addenda, Exhibit “A-1”?

A. And the addenda, Exhibit “A-1.” When I had gotten part way through this proposed contract, Edson Adams, one of the creditors, got on his feet, and said “We have heard enough of that.” Several of the other creditors, however, said “Oh, let’s hear it all, let him finish it,” and so I completed reading the proposed contract, with the addenda, after which there ensued a general discussion, in which Mr. Taylor’s name was mentioned, and Mr. Bayless got up, and he said he thought it was not right to discuss Mr. Taylor not in his presence, and that he ought to be at the meeting. Mr. Adams said “We don’t want to see him,” but one of the other creditors said, “Oh, let him come in,” so Mr. Bayless called Mr. Taylor, and within a very few minutes both Messrs. Taylor and Jackson came into the room. The creditors then catechised Mr. Taylor. The first question, as I remember it, being asked him was whether or not he considered himself a creditor of the Nevada Humboldt Tungsten Mines Company; Mr. Taylor says yes, and Mr. Jackson says no; and then the next question asked was whether or not Mr. Taylor was willing to take the concentrates which we had put up with him as security for the money he had advanced in payment

(Testimony of H. J. Murrish.)

of the loan, and call it square; Mr. Taylor says yes and no; he said, "If this deal goes through, yes; but if the deal does not go through, I don't know yet what I will do."

Q. What further was said or done at that meeting?

A. That is all that I recall now. The meeting became quite general at that point, and a committee of the five largest creditors was appointed to represent the rest of the creditors to look into the matter, and see what should be done with respect to our debts. [494—489]

Q. Did the creditors, or any or either of them, or their or either of their representatives, at that meeting assent to the contract, Exhibit 17, or Exhibit 17 as modified by Exhibit "A-1"?

A. Not a single creditor.

Mr. WHEELER.—I perhaps should call your Honor's attention to the fact that Exhibit "A-1," which I did not read, provides for 95 per cent of the creditors of the corporation to assent before it becomes operative.

Q. Did you, or did any defendant to your knowledge, ever assent, either conditionally or otherwise, to the execution of the agreement, Exhibit 17, or Exhibit 17 as modified by Exhibit "A-1"?

A. They did not agree to the execution of that contract with the addendum; however, there was this condition, that if our creditors insisted on our signing it, we would, but that was the only condition.

(Testimony of H. J. Murrish.)

Q. That was said? A. Yes.

Q. When? A. That was said Friday evening.

Mr. THATCHER.—To whom?

Mr. WHEELER.—(Q.) Counsel would like to know to whom that was said?

A. Now, perhaps I had better modify that; all during the week we said anything our creditors insisted on our doing, we would do; I won't state positively that that was said Friday evening after we got the contract, because I can't recall any of our conversation.

Q. The majority of your creditors had given an extension of time up to a certain date, hadn't they?

A. Yes, sir.

Q. What date was that?

A. As I recall it, it was July 1st, or July 15th; I don't want to state that with authority, because the secretary knows the date of the extension.

Q. In the course of Mr. Jackson's talk on any occasion was there any discussion in your presence as to who the officers of the [495—490] proposed new corporation should be?

A. There was no discussion as to officers made in my presence, or that I knew anything at all about.

Q. Was there any suggestions made in your presence that Mr. Poole was to be in charge of operations in the mine? A. No, sir.

Q. You recall no such statement being made in your presence? A. No, sir.

Mr. WHEELER.—I think, gentlemen, since you

(Testimony of H. J. Murrish.)

have brought it out in evidence, we will admit that the statement was made by some one in the course of these negotiations, whether the witness was present or not, Mr. Poole was to be in charge of operations at the mine, as testified to by Mr. Jackson; so that fact will stand admitted, but not that it was made in the presence of the witness.

Q. Was there any occasion when you knew that these gentlemen had a meeting when you were not present? A. Only the meeting Friday afternoon.

Q. You were not present at that meeting?

A. I was not present at that meeting.

Q. So far as you know, who was present at that meeting? A. Mr. Nenzel and Mr. Poole.

Q. Now was it ever suggested by any person in the course of any of these conversations that Mr. Poole had wilfully and falsely misrepresented to Mr. Taylor the quantity of ore in that mine, and that he was therefore a man unfit to be in charge of operations at the mine?

A. There never was any such statement made.

Q. Was anything said in the course of those conversations that Mr. Poole had attempted by fraudulent representations to induce Mr. Taylor to enter into the contract of the 2d day of April?

A. There was not.

Mr. WHEELER.—You may take the witness.
[496—491]

Cross-examination.

Mr. THATCHER.—(Q.) My understanding, Mr. Murrish, is that in all of the times you were in

(Testimony of H. J. Murrish.)

Denver, so far as you were concerned, there were no representations or statements of any kind made by either yourself, Mr. Nenzel, or Mr. Poole, as to the amount or character of the ore in the mine?

A. Not in my presence, no.

Q. And that the contract itself was prepared by you? A. No, sir.

Q. I mean dictated by you, is that correct?

A. It was redrafted, is a better word.

Q. Well, it would not have recognized itself after you got through with it, would it? A. Oh, yes.

Q. Do you mean to say the substance was there, the same as before?

A. Yes, there was only one change in particular, that I recall, that I wanted in the contract, that wasn't there; and that was that it should carry with it the option of January 16th so that it would expire a month earlier.

Q. And that was put in?

A. That was put in; that was the only change.

Q. How much of the time were you in the offices with Mr. Poole, Mr. Nenzel and Mr. Taylor?

A. Well, it is rather difficult to state the proportion of the time.

Q. You were not there all of the time, though?

A. No.

Q. You never read the Bancroft report?

A. No, I never saw it.

Q. You had never seen it until you got here, had you, or never read it? A. No.

(Testimony of H. J. Murrish.)

Q. Now you went to San Francisco about June the 2d, is my recollection?

A. We left on June 1st and got there June 2d.
[497—492]

Q. At that time you had a meeting at which Mr. Jackson was present, and at which Mr. Jackson stated the facts that he considered, or misrepresentations as to the ore had been made?

A. No, he didn't say that; he quoted what had been stated; he didn't say they were misrepresentations.

Q. He stated that it had been represented to Mr. Taylor that 60,000 tons of ore were in the mine, and that upon examination of Mr. Bancroft's report there were only 19,500 or 20,000 tons?

A. He said, "You people told Mr. Taylor that there were 60,000 tons of ore in the mine."

Q. My recollection is you didn't say aye, yes, or no to that statement in the first occasion?

A. I did not.

Q. Nor did any of the other defendants who were present? A. No.

Q. Now after the various conversations with reference to that matter had taken place, Mr. Jackson put to you the proposition of modified terms, did he not? A. In the same conversation.

Q. Then this was brought out afterward, wasn't it? A. Yes, that was brought out afterwards.

Q. Defendants' Exhibit "Q"? A. Yes.

Q. And that was the one which he handed to you?

A. Yes.

(Testimony of H. J. Murrish.)

Q. Now didn't Mr. Jackson after he drew the contract, this contract Exhibit number 17, didn't he say to you that you could make any changes, additions, or modifications which you desired?

A. Yes.

Q. In other words, what he was getting at, as you understood, was the substance of the first paper?

A. I don't know what he was getting at.

Q. Is not that the way you understood it in the negotiations? A. No. [498—493]

Q. But he did tell you that you could make any modifications, changes, or alterations in Exhibit number 17, that might be desired? A. Yes.

Q. And this paper, Exhibit "Q" is the proposition which he put up to you at that time?

A. No.

Q. Or before that time? A. Before that.

Q. Did you take that with you; was that handed to you, or to whom was it handed?

A. No, it was handed to Mr. Nenzel.

Q. It was handed to Mr. Nenzel? A. Yes.

Q. What did you do after you got it, did you go over it and discuss it?

A. As I recall it there was no discussion in my presence.

Q. You read it at that time, did you?

A. I don't know whether I read it after I left the meeting or during the conversation there, but I passed it right out of my mind as soon as I read it.

Q. But you did read it at that time?

(Testimony of H. J. Murrish.)

A. I think I did.

Q. And you have identified this as being the proposition that was put to you folks there at that time? A. That was the first proposition.

Q. That was the first proposition? A. Yes.

Q. And that was the thing, the proposition which resulted in this draft of this contract?

A. I don't know what it resulted in.

Mr. WHEELER.—That calls for the conclusion of the witness, I object.

Mr. THATCHER.—(Q.) When did you first see that paper, Mr. Murrish?

A. I should say it was some time on Tuesday, whether Tuesday morning—or Tuesday afternoon.

Q. Tuesday, what date?

A. That would be the 3d, wouldn't it?

Q. Well, I am asking you.

Mr. COOKE.—You are talking about Exhibit "Q"? [499—494]

Mr. THATCHER.—Yes, the paper marked Exhibit "Q."

WITNESS.—Some time Tuesday, whether the 3d or the 2d of June, I don't know.

Q. Who had it at that time?

A. It was being handed about through the meeting; there were six or seven of us in the office, and it was there in front of all of us.

Mr. DAVIS.—(Q.) Whose handwriting is that?

Mr. THATCHER.—Just a minute, if you please, Mr. Davis, until I get through with this examination.

(Testimony of H. J. Murrish.)

Q. It was handed around amongst the meeting, was it? A. Yes.

Q. You and Mr. Nenzel and Mr. Poole, and who else, Mr. Jones? A. Yes, Mr. Jones was there.

Q. Mr. Jones was there, and your best recollection is that that was passed around at the meeting?

A. No, Mr. Thatcher.

Q. Well, what was it, Mr. Murrish?

A. There were six or seven of us sitting around two tables in Mr. Bayless' office, and this was on the desk; now there was a general discussion, probably two or three of us talking at once.

Q. In whose handwriting is that?

A. I haven't any idea.

Q. That handwriting was on there at the time, wasn't it? A. Yes.

Q. Was this interlineation, just after 1.75?

A. Yes.

Q. And ahead of 03? A. Yes.

Q. On there? A. Yes.

Q. Were the words "preferred stock" crossed out, and "bonds" substituted at that time?

A. Yes.

Q. And that was the proposition that was made at that time? A. Yes.

Q. Did you ever see my handwriting, Mr. Murrish? A. No, sir, I never have. [500—495]

Q. Did you know anything about me in this transaction at that time? A. No, sir.

Q. When did you first hear about me in this transaction?

(Testimony of H. J. Murrish.)

A. I believe the first time that I heard about you was when you sent a notice to the stockholders' meeting.

Q. When I sent a notice to the stockholders' meeting? A. Yes, I am not sure about that.

Q. You are confident that is the paper, though, that was presented at that time?

A. I am satisfied it is.

Q. You are absolutely satisfied of that?

A. Yes, sir.

Mr. THATCHER.—That is all.

(By Mr. COOKE.)

Q. Mr. Murrish, in regard to this meeting in Denver, there is a document here known and referred to as Exhibit "B," on two sheets, on which are some computations made by Mr. Taylor and Mr. Poole, at least by Mr. Taylor, and discussed with him by Mr. Poole; do you remember that document being used down there in conversation?

A. In Denver?

Q. Yes. A. Yes, sir.

Q. And the map referred to by Mr. Poole, and marked Exhibit "Y," do you know what that is, did you see that here in court? A. Yes.

Q. Was that used down there in the discussions and conferences? A. Yes.

Mr. THATCHER.—Might I interrupt a moment. I would like to correct the record. This paper which I have shown you and referred to as Exhibit "Q," is Exhibit "Z," is it not?

A. If this is a "Z," it is Exhibit "Z."

(Testimony of H. J. Murrish.)

Mr. THATCHER.—I ask that the record show the correction; that the paper referred to is Exhibit “Z.” [501—496]

Mr. COOKE.—That is the paper you asked the witness about in the concluding portion of his testimony?

Mr. THATCHER.—Yes.

Mr. COOKE.—(Q.) Did you have a conversation with Mr. Taylor at the Brown Palace Hotel at Denver, in reference to your refusal to sign this agreement when that matter was discussed?

A. Where what matter was discussed?

Q. Your refusal to sign this agreement of April 2d? A. Yes.

Q. I wish you would state what took place at that time.

A. Well, practically all that took place at that time was that Mr. Taylor said I had given my word to him that I would sign it, and I said that I had not given my word, but if he said I had, that I would sign it.

Q. Were Mr. Nenzel and Mr. Poole there with you at that time? A. Yes.

Q. In the conversation at this Denver conference, or any of those conversations, did you hear the subject matter of Bancroft making any further examination of the property mentioned by either Mr. Taylor or Mr. Poole? A. No, sir.

Q. Did you hear the subject matter or the results of the Morrin sampling being put upon the mine map being discussed by either of them?

(Testimony of H. J. Murrish.)

A. No, sir.

Q. In reference to this document marked Plaintiff's Exhibit 17, being the proposed contract of June 2d, proposed by Mr. Taylor at San Francisco, was it suggested by anybody down there in your presence that you prepare that document, or that you have anything to do with the preparation of it before it was finally drafted? A. Yes.

Q. Well, who was it said anything on that subject, and what was said? [502—497]

A. Mr. Taylor had prepared a form of contract, and I objected to it in the form in which it was presented to me, and he said, "Well, you go ahead and dictate it."

Q. Is this the contract down in the San Francisco meeting? A. No, this is the April 2d.

Q. No, I am talking about the San Francisco meeting, and ask you the question whether or not you were notified by Mr. Taylor, Mr. Jackson or anybody, to have anything to do with the preparation of that proposed contract, which was afterwards submitted and read at this creditors' meeting? A. No, sir.

Q. At the time Mr. Poole addressed the creditors' meeting with reference to the contract proposed by Mr. Taylor, what, if anything did Mr. Poole do in regard to advising the creditors for or against the acceptance of that contract; what did he say?

A. He simply told the condition of the company, the condition of the mine, and told the probability of our being able to pay our debts.

(Testimony of H. J. Murrish.)

Q. Did he in that meeting express any opinion with reference to the advisability of accepting the contract or not; if so, state what he said?

A. He did not; he didn't advise the acceptance or rejection of either one.

Q. Did he say anything with regard to whether the contract was a harsh or unconscionable one, or otherwise?

Mr. THATCHER.—I object to the question as leading.

The COURT.—It is leading, but he may answer it.

A. Well, he probably said it was hard and unconscionable, but that was no reason for the creditors signing it.

Mr. COOKE.—That is all.

Mr. THATCHER.—That is all. [503—498]

Mr. THATCHER.—If you want the files in this other case, we will admit that they are offered and considered.

Mr. COOKE.—You mean in case 2263?

Mr. THATCHER.—Subject to our objection.

Mr. COOKE.—In support of the separate defense, the answer of both the defendants in reference to the matter of the suit commenced on August 16th, 1919, by David Taylor against C. W. Poole and others, case number 2263, as constituting an election and bar to this suit; you say you will admit the copies pleaded?

Mr. THATCHER.—I will admit those are pleadings, and merely make the objection that they do

not constitute a proper defense or any defense to the action at bar.

Mr. COOKE.—We will offer in evidence the bill of complaint, the original document, and ask to substitute a certified copy.

Mr. THATCHER.—No objection to that.

The COURT.—They will be admitted, but the objection of Mr. Thatcher will be considered.

(Bill of Complaint in case No. 2263 is marked Defendants' Exhibit "A-2.")

Mr. COOKE.—We also offer in evidence for the same purpose, and in connection with the last exhibit, the answer of defendants Poole, Nenzel and others, filed March 18th, 1920.

Mr. THATCHER.—That is the damage case?

Mr. COOKE.—Yes.

Mr. THATCHER.—Same objection, if the Court please.

The COURT.—You offer it for the same purpose?

Mr. COOKE.—Yes.

The COURT.—That is offered simply and solely on the question of election.

Mr. COOKE.—Yes, sir. [504—499]

(The answer of Poole, Nenzel, Murrish, et al., in case No. 2263, is marked Defendants' Exhibit "A-3.")

Mr. COOKE.—We offer in evidence the reply of the plaintiff, filed April 12th, 1920, in connection with the other exhibits, and for the same purpose.

The COURT.—In connection with the other exhibits?

Mr. COOKE.—The other exhibits immediately preceding.

(The reply of the plaintiff, David Taylor, in case No. 2263, is marked Defendants' Exhibit "A-4.")

Mr. COOKE.—The balance of this record seems to be stipulations, and I don't know that they have any bearing in the case; and I don't know that I care to offer them.

Mr. THATCHER.—If your Honor should consider them on the question of election, I think with the question of election is the question of laches, also pleaded with it; and if your Honor should conclude those matters constitute a part of the defense, or if any laches is shown in that matter, we would like to have the stipulations also considered.

Mr. COOKE.—No objection if you want them in.

The COURT.—This is not offered on that question, is it. Are these pleadings offered for any other purpose than on the question of election?

Mr. COOKE.—On the question of election is all I am offering them.

Mr. WHEELER.—I think they should be in for every purpose, your Honor. I take it when a plaintiff comes in and sues for damages in a case of this character, independent of the doctrine of laches, where he knows a contract has been made, and knows thousands of dollars are being paid on, and he waits for months, and months and months, until after thousands of dollars have been paid before commencing his suit, it is evidence of laches. [505

—500]

The COURT.—I think that should be admitted as the date when you commenced your suit; but the doctrine of laches, as I understand, is only urged as against this suit, and the date of this suit is here now.

Mr. WHEELER.—Upon that proposition, your Honor, all that the plaintiff has done, all his affirmative actions after knowledge of the Loring contract, would go to the question of his laches.

The COURT.—It may go in then for that purpose; I will consider that.

Mr. COOKE.—For whatever purpose it may be competent.

The COURT.—As far as I think it is worthy. Do you want to argue the question of laches now?

Mr. WHEELER.—We are prepared to argue it at any time.

The COURT.—You had better have some evidence first.

Mr. WHEELER.—I think perhaps it would be better. We will proceed and finish the testimony. With reference to resolutions, and those matters, appearing in the documents, perhaps counsel will agree that the documents may be received in evidence?

Mr. THATCHER.—I think so.

Testimony of J. T. Goodin, for Defendants.

Mr. J. T. GOODIN one of the defendants, called as a witness, after being sworn, testified as follows:

Direct Examination by Mr. WHEELER.

Q. What is your occupation, Mr. Goodin?

A. I am cashier of the First National Bank of Lovelock.

Q. Do you reside in Lovelock? A. Yes, sir.

Q. For how long a period of time have you been president of the First National Bank at Lovelock?

A. Cashier.

Q. Or cashier, I mean.

A. Since 1911, I think. [506—501]

Q. Do you know the plaintiff Taylor in this action? A. I have met him.

Q. You are one of the defendants in the action, are you? A. Yes, sir.

Q. Do you know Mr. Jackson, one of the plaintiff's attorneys in this case? A. I have met him.

Q. Do you recall a conversation that you had with Mr. Taylor and Mr. Jackson on or about the first day of June, 1919? A. Yes, sir.

Q. Where did that conversation take place?

A. In their room in the Big Meadow Hotel at Lovelock.

Q. Did you on that occasion say either to Mr. Jackson or to Mr. Taylor, or to both of them, that you had been fooled in the matter of the mine of the defendant Nevada Humboldt Tungsten Mines Company? A. No, sir.

(Testimony of J. T. Goodin.)

Q. On that occasion or on any other occasion at or about that time, did Mr. Taylor or Mr. Jackson say to you in the presence of the other at Lovelock, in the Big Meadow Hotel, or elsewhere, that Mr. Poole had represented to Mr. Taylor that there were 60,000 tons of ore in the mine of the said Nevada Humboldt Tungsten Mines Company, and that Mr. Bancroft now reported only 20,000 tons of commercial ore?

A. I don't remember of hearing any definite statement as to tonnage.

Q. Was there said, in substance or effect, that Mr. Bancroft had not found as much ore in the mine as was expected, or any words to that effect?

A. Yes, I think one or the other of them said that.

Q. When that was stated did you either by silence or orally, assent to the statement as being a statement of fact as to any representations made regarding the question of ore in the mine, to Mr. Taylor?

A. No, sir, I knew absolutely nothing about it whatever.

Q. Had you ever represented or stated or informed Mr. Taylor that [507—502] there were 60,000 tons of ore in the mine, or any other number of tons of ore?

Mr. THATCHER.—Mr. Wheeler, you need not proceed along that line. We don't contend Mr. Goodin ever represented there was anything in the

(Testimony of J. T. Goodin.)

mine, or made any statements at all as far as he was concerned, excepting as it may be through power of attorney.

Mr. WHEELER.—I think that is legitimate, your Honor, because it is alleged that these representations were falsely made and fraudulently, by the three persons named, while acting for these other stockholders.

The COURT.—Go on.

(By direction the reporter reads the question.)

A. I had not.

Mr. WHEELER.—(Q.) Did you ever know of any person, either Mr. Nenzel, Mr. Poole, Mr. Murrish, or any other person, making any statement to Mr. Taylor with regard to the tonnage of ore in the said mine or mines?

A. I did not—I have not.

Q. Did you ever know of Mr. Poole or Mr. Murrish, or Mr. Nenzel making any statement to Mr. Taylor regarding the value or contents in tungstic acid of the ore in the said mine?

A. No, sir, I have not.

Q. Did you ever admit or say anything to Mr. Jackson or Mr. Taylor to the effect that any such statement ever had been made by any person to Mr. Taylor at any time? A. No, sir.

By Mr. COOKE.—(Q.) Mr. Goodin, you answered Mr. Wheeler by saying that you did not recall anybody mentioning the figure 60,000 tons in that conversation which you had with Mr. Jack-

(Testimony of J. T. Goodin.)

son and Mr. Taylor at Lovelock; are you able to state whether those figures, 60,000 tons, were mentioned at all in that conversation by anybody?

A. Well, to the best of my recollection, there was no definite [508—503] amount stated, but I think that they said, one or the other of them, that Mr. Bancroft had not found as much ore as they thought was there, something to that effect; I can't remember the exact words.

Q. But you don't recall any 60,000 tons mentioned in the conversation at all?

A. I don't remember it.

Q. Did you attend the creditors' meeting in San Francisco shortly after this talk you had at Lovelock? A. Yes, sir.

Q. What creditor or creditors did you represent?

A. Well, I represented the First National Bank at Lovelock, and the Continental National Bank at Salt Lake City.

Q. Were you there at the time Mr. Poole and Mr. Murrish addressed the creditors' meeting?

A. Yes, sir.

Q. I wish you could state briefly just what took place, as you recall it?

A. Well, I believe Mr. Poole spoke first, I am not sure, though; and it was as to the condition of the mine, and as to what they could do—I don't know which one of them did go first, but anyhow Mr. Poole talked along the lines they could pay out the debt; the creditors asked them a good many

(Testimony of J. T. Goodin.)

questions, and that was the substance of what he had to say, outlining the way that they could work out of debt, if tungsten stayed at a certain price.

Q. Was some proposed contract with Taylor brought before the meeting?

A. Well, Mr. Murrish read that contract; I don't know whether he read that before Mr. Poole talked, or whether it was afterwards, but Mr. Murrish read that proposed contract; and as I remember it, when he finished and made the statement that we don't want to sign this contract, but we will sign it if our creditors demand it, he says, "We are in the hands of our creditors."

Q. What did the creditors say about it?

A. Well, they didn't seem to take very much stock in it.

Q. Did you hear any of them express any opinion there in regard to [509—504] it at the time that Mr. Jackson or Mr. Taylor were there?

A. Well, as I remember it, the most of this conversation in regard to it was before they were sent for. There was quite a bit of talk among the creditors, and then they sent for Mr. Taylor, but I didn't hear any creditor express himself being in favor of the company signing such an agreement as that; and all of them that I did hear express themselves, expressed themselves as being opposed to it; and I represented the largest line of credit there was there, and I certainly was opposed to any agreement of that kind being signed.

(Testimony of J. T. Goodin.)

Q. Was the subject of anybody trying to buy the accounts against the Nevada Humboldt Tungsten Mines Company discussed in the creditors' meeting?

Mr. THATCHER.—Objected to as incompetent, irrelevant and immaterial.

Mr. COOKE.—(Contg.) At the time when Mr. Jackson or Mr. Taylor were present?

Mr. THATCHER.—Objected to as incompetent, irrelevant and immaterial, and not constituting a defense to the action.

Mr. COOKE.—We think it is proper, if the witness knows anything about it, to show what the conversation was; and we rather think it is competent as showing the motives and purposes actuating the plaintiff Taylor at that time; it seems to me it would throw some light upon his motives and his purposes.

The COURT.—We can probably understand his motives. Every man in a deal of that kind is trying to do the best he can for himself, but will this show anything more than that?

Mr. COOKE.—Well, I think it will show confidence on his part that he was not advancing a fair proposition, and that he would have to get something else by way of coercion to compel these people to accept it; that is our theory. The purpose in offering [510—505] the testimony is to show that this man Taylor was trying to buy up all the accounts he could against the company,

(Testimony of J. T. Goodin.)

with the idea of using the power which that ownership would give him to force the company to accept a proposition they would not otherwise accept.

(Discussion.)

The COURT.—I will let the testimony in, but it may be argued.

(The reporter reads the question.)

A. I don't believe it was; I don't recall it.

Mr. COOKE.—I think that is all.

Mr. THATCHER.—That is all.

(At 4:15 o'clock P. M. Court adjourns until Wednesday, September 22d, 1920, at 10 o'clock A. M.)

Wednesday, September 22d, 1920.

Court convened, 10:00 o'clock A. M.

Mr. J. T. GOODIN, recalled for further direct examination.

Mr. WHEELER.—(Q.) Mr. Goodin, are you familiar with the contract entered into between the defendant Loring and the defendant Nevada Humboldt Tungsten Mines Company, and others?

A. Yes, sir.

Q. You were a party to the contract?

A. Yes, sir.

Q. Do you know whether or not the payments called for by that contract were made by Mr. Loring at the time and in the manner called for by the contract?

A. Yes, sir, every one of them has been made right on time, or a day or two in advance.

(Testimony of J. T. Goodin.)

Q. Do you recall what the total amount is that has been paid in by Mr. Loring under the terms of that contract?

A. Well, the contract called for three—

Mr. THATCHER.—Answer the question.

[511—506]

A. Well, I can tell you.

Mr. WHEELER.—(Q.) It is a mere matter of computation; you don't recall offhand? A. No.

Q. But they all have been made at the times indicated in the contract, have they?

A. Absolutely, yes, sir.

Q. What has been done by the respective corporations defendant in the matter of the payment of their debts?

A. They have paid them all.

Q. Out of what money?

A. Out of the money received from Mr. Loring.

Q. Among the debts paid by the said corporation out of the moneys received from Mr. Loring, has any payment been made to the plaintiff David Taylor?

Mr. THATCHER.—Objected to as calling for the conclusion of the witness, incompetent, irrelevant and immaterial.

The COURT.—He can tell what has been done.

A. Yes, sir, it has.

The COURT.—Well, that may go out. Just tell what has been done with reference to any claims that Mr. Taylor had against any of these companies; just tell the fact.

(Testimony of J. T. Goodin.)

Mr. WHEELER.—(Q.) Are you familiar with a suit brought by Mr. Taylor against the Nevada Humboldt Tungsten Mines Company in this court to recover something above \$9,000?

A. I thought it was seven thousand and something.

Q. Well, you are speaking now of the amount for which the suit was settled, perhaps.

A. Yes, sir.

Q. You remember that he did bring a suit, claiming a balance due under his contract, advances made by him pursuant to the contract that is annexed to the complaint in this action, marked Exhibit “A”?

A. Yes, sir. [512—507]

Q. I hand you a cancelled check, dated December 15, 1919, for \$1,000, drawn in favor of Norcross, Thatcher & Woodburn, and ask you whether or not you have ever seen that check before?

A. Yes, sir, I have.

Q. What was done with that check?

A. That check was mailed to French & Gibbons at that time at Reno, and by them turned over to the attorneys for Mr. Taylor.

Q. Did you ever receive a voucher from the attorneys for Mr. Taylor?

A. Well, it came direct back to the office, this voucher did.

Q. Do you recognize the document which I now place in your hands purporting to be signed by Norcross, Thatcher & Woodburn, as the voucher so received? A. Yes, sir.

(Testimony of J. T. Goodin.)

Q. Is it a voucher for that particular check?

A. Yes, sir; it is numbered on the back the same as the check is.

Mr. WHEELER.—We offer the check and the voucher in evidence, and ask that they be marked respectively Defendants' Exhibits "A-5" and "A-6."

Mr. THATCHER.—We object on the ground it is irrelevant and immaterial to any of the issues in the case, and does not constitute or tend to prove any defense.

Mr. DAVIS.—I suggest you read the endorsements in the offer.

Mr. THATCHER.—Oh, we admit the endorsements.

Mr. WHEELER.—Counsel says he admits the endorsements, which I will read; "Pay to the order of David Taylor," signed, "Norcross Thatcher & Woodburn; pay to the order of the Colo. National Bank," signed, "David Taylor." The money being immediately traced into the hands of David Taylor.

The COURT.—It shows what they have been doing with the money; I suppose it is offered for that purpose? [513—508]

Mr. WHEELER.—It is offered for another purpose, to show that David Taylor has knowingly received some of the money which Mr. Loring has paid into the corporation under this contract, and I call your Honor's attention to our special plea of estoppel.

(Check No. 1178, to Norcross, Thatcher & Woodburn, dated December 15, 1919, for \$1000, is marked Defendants' Exhibit "A-5" and Receipt Voucher for \$1000 is marked Defendants' Exhibit "A-6.")

Mr. THATCHER.—To this we make the same admission; That they were received, and the endorsements on them are correct; they need not be authenticated.

Mr. WHEELER.—Thank you. We now offer in evidence a check dated Lovelock, Nevada, February 9, 1920, payable to Gibbons, French & Stoddard, for \$6,334.04, which will be marked as our Exhibit "A-7."

(Check No. 3229, dated Feb. 9, 1920, payable to Gibbons, French & Stoddard, is marked Defendants' Exhibit "A-7.")

Mr. WHEELER.—And the endorsements are to be considered as read. The next check which I offer, which will be "A-8," is dated February 7th, 1920, is drawn on the First National Bank of Lovelock by Mr. Friedman, the president, and by the secretary, of the Nevada Humboldt Tungsten Mines Company. Will it be admitted that this is the—

Mr. THATCHER.—We will admit that that is their check.

Mr. WHEELER.—And drawn by the Nevada Humboldt Tungsten Mines Company in payment of the draft which has just been read in evidence?

(Testimony of J. T. Goodin.)

Mr. THATCHER.—Yes.

Mr. WHEELER.—This being dated February 7th; the sequence is that the check is drawn by the company and the draft sent. And we offer the voucher, which will be “A-9.”

(Check of Nevada Humboldt Tungsten Mines Company to First [514—509] National Bank of Lovelock, for \$6334.04, dated Feb. 7, 1920, is marked Defendants’ Exhibit “A-8;” and Receipt Voucher of Norcross, Thatcher & Woodburn for \$6334.04, is marked Defendants’ Exhibit “A-9.”)

Mr. WHEELER.—(Q.) Can you state the respective proportions of the indebtedness, or of the respective amounts of the indebtedness of the different corporations defendant, which were paid out of Mr. Loring’s moneys, which he had paid in on account of the contract already referred to by you?

Mr. THATCHER.—Objected to as irrelevant and immaterial.

The COURT.—Objection overruled.

A. The total indebtedness was in the neighborhood of \$200,000, and it has all been paid.

Mr. WHEELER. — (Q.) Approximately how much of that amount was indebtedness of defendant Nevada Humboldt Tungsten Mines Company?

A. Well, nearly all of it; there was about \$10,000, I believe, outside of that that was of the—I can’t recall that.

The COURT.—Tungsten Products?

A. Yes, sir. Now I am not sure absolutely as to those figures, but that is my best recollection.

(Testimony of J. T. Goodin.)

Mr. WHEELER.—And how much, if any represented the indebtedness or a portion of the indebtedness of the Mill City Development Company?

A. I don't believe that I can answer that and tell you, Mr. Wheeler.

Q. Do you recall whether any part or portion of it represented the indebtedness, or a portion of the indebtedness, of that corporation?

A. Of the Mill City Development Company?

Q. Yes. A. I don't remember.

Q. Have you any memoranda in your special custody or control from which you could ascertain the respective liabilities of those corporations which were paid off with Mr. Loring's money? [515—510]

A. I could get it, and I know approximately the amount of all of them together was \$200,000, but I cannot give them to you separately.

Q. You say you could get it, could you get it at the bank?

A. Yes, I have a list of all those things there.

Q. Perhaps I have a document which will refresh your memory, at least to some extent. I hand you a document dated the 23d day of June, 1919, and ask if that bears your signature?

A. Yes, sir.

Q. I call your attention to the recitals in the document—this, Mr. Thatcher, is his appointment as trustee for the creditors. Examine it and see whether there is anything in that document which will refresh your memory with regard to the

(Testimony of J. T. Goodin.)

amount of indebtedness existing at the time that the document bears date. (Hands to witness.)

A. Well, this would make a hundred and eighty, wouldn't it?

Q. As of that date?

A. Yes, sir, as of that date.

Q. I call your attention to the recital that the Nevada Humboldt Mines Company and the Tungsten Products Company are indebted in various sums, aggregating approximately \$111,493.96?

A. Yes.

Q. And in the sum approximately of \$32,674.88, which accrued since April 30, 1919, which latter amount includes approximately \$5000 for supplies still on hand, and in addition the sum of about \$35,000 due the Wells Fargo Nevada National Bank of San Francisco; is there anything in any of those items that will enable you to segregate the amounts in which the respective corporations defendant were indebted which indebtedness was paid out of the Loring money; if not, and you have memoranda from which you can ascertain that, we will ask you to do it accurately.

A. All of it was paid out of the Loring money with the exception of what was due the Wells Fargo Bank—no, that was paid too; that was paid out of the Loring money too; it was all paid out of the Loring money, as I remember it, because they had no other money to [516—511] pay it out of.

Mr. THATCHER.—(Q.) Do you know that, or is that the way you understand it? A. I know it.

(Testimony of J. T. Goodin.)

Q. Did you handle those accounts? A. Yes, sir.

Q. Did you handle those accounts and make those payments? A. Yes, sir.

Mr. WHEELER.—(Q.) Can you from memorandum that you have at your office or elsewhere, ascertain the respective amounts due the respective companies? A. I can.

Mr. WHEELER.—Will it be satisfactory to counsel if Mr. Goodin sends a written memoranda of that after he returns home?

Mr. THATCHER.—Yes, subject to its relevancy and materiality.

Mr. WHEELER.—The fact will be admitted that the account personally is a full, true and correct statement, but you will not admit its relevancy, competency or materiality in the case, and if admitted, it will be subject to your objection.

Q. How long will it take you to send that to us?

A. I am going home to-night, and I can send it to you to-morrow.

Mr. THATCHER.—I will admit that the papers which counsel holds were executed as shown by the papers themselves, and merely object to them on the ground they are irrelevant and immaterial, and not within the issues of this case, or tending to prove or disprove any defense in behalf of the defendants.

Mr. WHEELER.—The first document we offer is dated June 9th, and purports to be an extension by certain creditors till the 17th day of June, of time within which they will not seek to enforce any of their obligations, being a document which would

carry the obligations to the 17th day of June. We will next offer a document bearing date the 23d day of June, being a trusteeship on the part of Mr. Goodin for the benefit of certain creditors.

The COURT.—To what issue do those documents go? [517—512]

Mr. WHEELER.—The occasion for offering the documents is this, your Honor: One of the objections that is here made to the sufficiency of Mr. Loring's contract and deeds is that there was not sufficient notice of a certain meeting given; and it would appear to us to be the law that even where there are mandatory statutes, directly covering cases of the same character, requiring that there shall be the consent of a certain percentage of stockholders given at a meeting called for a purpose upon a designated notice, that it is held that where there is a necessity for corporate action that such statutes do not apply. In short, we understand it to be the common-law rule, that all or any part of the property of a corporation can be disposed of for the payment of its debts. We argue first, that the Nevada statute that the plaintiff relies upon here was not intended to change the common law; that it was not intended to place an inhibition upon a corporation forbidding it to dispose of its property for the payment of its lawful debts; that it was only intended to meet the situation and requirements of the common law, which would prevent a corporation from transferring all of its assets and its business, without the consent of the stockholders.

(Testimony of J. T. Goodin.)

Mr. THATCHER.—I won't object if that is the purpose of it; we can argue the question of law at the time.

The COURT.—If you want to urge that point, it will go in, and its admissibility will depend on what the law is on that point.

(Appointment of J. T. Goodin as Trustee dated June 23, 1919, is marked Defendants' Exhibit "A-10"; and Agreement in re extension of time, dated June 9th, 1919, is marked Defendants' Exhibit "A-11.")

Mr. WHEELER.—That is all.

Cross-examination.

Mr. THATCHER.—(Q.) Wells Fargo bank account, by what was that paid?

A. By Loring money. [518—513]

Q. Are you sure about that? A. Yes.

Q. When you paid it did you get anything back from Wells Fargo? A. No.

Q. Don't you recollect whether or not the Wells Fargo account was secured by concentrates?

A. It was.

Q. When you paid the account out of the Loring money, did you get the concentrates back?

A. Mr. Loring bought all the assets of the Nevada Humboldt Tungsten Mines Company.

Q. And he took over the equity of the company then in the concentrates?

A. He took everything, and made his payments according to contract, and I paid the debts of the

(Testimony of J. T. Goodin.)

concern out of the money furnished by Mr. Loring.

Q. And he took over the security which had previously been up with the Wells Fargo Bank, the concentrates?

A. Yes, he took the concentrates.

Mr. THATCHER.—That is all.

Redirect Examination.

Mr. WHEELER.—(Q.) You said Mr. Loring bought all of the assets of the Nevada Humboldt Tungsten Mines Company; did he buy everything or were there some exceptions, as noted in the bill of sale?

Mr. THATCHER.—Object to the question as leading.

Mr. WHEELER.—Very well. (Q.) Did he buy everything?

Q. The property of the Nevada Humboldt Mines Company?

Q. I hand you a document, purporting to be a contract between the Nevada Humboldt Tungsten Mines Company and others, to W. J. Loring, dated the 16th day of August, 1919, and ask you if you are familiar with that contract? A. Yes, sir.

Q. And I call your attention to the following portion thereof—

Mr. THATCHER.—Objected to on the ground that the contract speaks for itself; it is already in evidence. [519—514]

The COURT.—I don't see why he can't call his attention to the property that is described in that

(Testimony of J. T. Goodin.)

document, and then ask if there was anything that was not transferred. I suppose that is your idea?

Mr. WHEELER.—That is my idea, your Honor.

The COURT.—Proceed.

Mr. WHEELER.—(Q.) I call your attention to the following portion: “And also, all of the personal property of every kind and description owned by the parties of the first part and each of them, including,” then follows a list of what is included, “in brief, every article of personal property including credits owned by the parties of the first part, or either of them, excepting only their books, corporate seal, and records, and except any item of cash in bank above the amount of \$195.46, and except supplies now at Mill City amounting to \$1106.25, being the following items,” then reciting the items. State whether or not when you said a moment ago that all of the assets were transferred, the transfer did or did not include the items excepted from the contract in the language just read?

Mr. THATCHER.—I object on the ground the question is leading; it seeks to impeach their own witness, and it is testifying from a written instrument which speaks for itself.

The COURT.—The record of course shows what was transferred.

Mr. WHEELER.—The record shows what was transferred; but I think my question was—it was designed if not framed, to meet this situation: Was there any other or different transfer that you

(Testimony of J. T. Goodin.)

had in mind when you said they transferred all of the assets, than this particular transfer?

Mr. THATCHER.—That is all right.

WITNESS.—I will say this; I was busy with other things, and [520—515] this was a side issue, and I remember now; but I don't give to this thing all my time, and things like that naturally had escaped my mind. Of course, I remember now when I see it in the contract here that those things were in.

Mr. WHEELER.—(Q.) So, in other words, the contract was carried out in that respect as drawn?

A. Yes, sir.

Mr. WHEELER.—The witness has referred to this particular document; I think we had better have it in, and marked the next number.

(Contract between the Nevada Humboldt Tungsten Mines Company and Tungsten Products Company and W. J. Loring, dated August 16, 1919, is marked Defendants' Exhibit "A-12.")

Mr. WHEELER.—That is all. Mr. Thatcher, you will admit it is a fact, for us to offer as a fact, that the moneys which appear in the voucher signed by your firm in behalf of David Taylor, were accounted for to David Taylor?

Mr. THATCHER.—Yes, I think the checks show on their face.

Mr. WHEELER.—One does, the other does not.

Mr. THATCHER.—Well, they were.

Mr. WHEELER.—The item of over \$6,000 is the one I am addressing myself to.

(Testimony of L. A. Friedman.)

Mr. THATCHER.—For the purpose of the record, that was sent by us to the New York Trust Company, deposited to the account of David Taylor. [521—516]

Testimony of L. A. Friedman, for Defendants.

L. A. FRIEDMAN, one of the defendants, called as a witness on behalf of the defendants, after being sworn, testified as follows:

Direct Examination by Mr. WHEELER.

Q. Mr. Friedman, what is your occupation?

A. Mining.

Q. Do you hold any relation to any banking institution? A. Not at the present time.

Q. Where do you reside?

A. Lovelock, Nevada.

Q. You are one of the defendants in this action?

A. I am.

Q. Were you also a defendant in an action brought by David Taylor for the recovery of \$9,000, or thereabouts, an action subsequently settled by the payment of money? A. I was.

Mr. WHEELER.—I am not sure I have asked you in accordance with the fact; let me have the action, if you please, I think it is here in evidence; a suit to recover \$9,000.

Mr. THATCHER.— I will admit the suit was filed, Mr. Wheeler, and that the record may be used and referred to.

Mr. WHEELER.—(Q.) At any rate, you are

(Testimony of L. A. Friedman.)

familiar with the fact that the suit was brought by David Taylor to recover from the Nevada Humboldt Tungsten Mines Company the sum of \$9,000, or thereabouts, are you?

A. Yes, sir, I was served with summons.

Q. Are you familiar with the fact that suit was settled? A. Yes.

Q. Did you have anything to do with the arranging for the payment of money in that suit, in settlement of that suit?

A. I arranged for the settlement.

Q. Did you in the course of that litigation have any conversation with Mr. Thatcher, one of the attorneys for David Taylor in that action? [522—517]

Mr. THATCHER.—Object on the ground it is incompetent, irrelevant and immaterial to the present issue. Any conversation that he had with me was merged into the actual settlement itself, and it is nothing more or less than a preliminary negotiation.

Mr. WHEELER.—This is a preliminary question.

The COURT.—Well, he may answer that.

A. Yes.

Mr. WHEELER.—(Q.) Was anything said in the course of that conversation with reference to the source from which you would obtain the moneys with which to pay the claim? A. Yes.

Q. What was said between you and Mr. Thatcher upon that subject?

Mr. THATCHER.—I object on the ground it is incompetent, irrelevant and immaterial, not within any of the issues in this case, and being nothing more nor less than a negotiation which led up to the settlement itself, and merged in the settlement, and not binding upon the plaintiff David Taylor.

The COURT.—How about negotiations for a settlement?

Mr. WHEELER.—It was not negotiation for a settlement at all. It is simply for the purpose of showing counsel will admit it—he knew directly while he was acting in this matter for David Taylor that the source of the money, or a portion of it at least, was to be from funds received from Mr. Loring.

Mr. THATCHER.—I don't want to go on the witness-stand and dispute Mr. Friedman's statement, but Mr. Friedman is mistaken.

Mr. WHEELER.—Counsel does not yet know what Mr. Friedman is going to testify to, so I can hardly see why it is necessary to announce in the presence of this witness that he disputes it; we think it will not be disputed after Mr. Friedman testifies; if counsel does not recall it already, he will recall it then.

The COURT.—Well, I will admit it, but it will go in subject to [523—518] a motion to strike.

WITNESS.—When I made that settlement, or arranged for it, I went to Reno to see Mr. Gibbons, who was at that time our attorney, of Gibbons, French & Stoddard; and I told him what terms we could set-

(Testimony of L. A. Friedman.)

tle on, which was that we would pay one thousand dollars, which amount we still had in our treasury from the previous payment that had been made.

Mr. WHEELER.—(Q.) By whom?

A. By Mr. Loring.

The COURT.—Is this responsive to any question?

Mr. WHEELER.—I think this may all go out. Read the question please.

(The reporter reads the question; What was said between you and Mr. Thatcher upon that subject?)

A. When I left Mr. Gibbons' office about 4 o'clock in the afternoon, I was told that Mr. Gibbons had taken sick and gone home; I was to see him, so I started towards the hotel and I met Mr. Thatcher on the street close to the Reno National Bank; I asked him if he had seen Mr. Gibbons at noon, and he said, "yes"; "Well," I said, "is that agreeable, the arrangement that we had made to pay a thousand dollars now, and the balance when we get the money, on the first payment that we can spare the money"; and he said, "Well, I think if that is the best that can be done that that will be agreeable to my client but I will have to take it up with him first"; "Well," I said, "that is the very best we can do, because we haven't got the money until we get that payment, and if we can't do that, we will have to let it go, even though we have to let them take judgment by default"; "But," I said, "if you are afraid of the payment being made, Mr. Goodin and I will personally sign a stipulation that we will guarantee the payment of it"; "Oh," he said,

(Testimony of L. A. Friedman.)

“that is all right, anything that Mr. Goodin signs goes with me.”

Q. You say until the second payment or other payment was made, [524—519] what payment did you refer to, in your conversation with Mr. Thatcher?

Mr. THATCHER.—Objected to as calling for the conclusion of the witness.

The COURT.—He can repeat what was said. I will sustain the objection.

Mr. WHEELER.—(Q.) Repeat again, please, what was said on that occasion by you to Mr. Taylor, with regard to the matter of payment.

A. Well, I told him that unless we could make that kind of a settlement, that we would have to let it go, even though they would take judgment by default, as we did not have the money until the next payment was made, which was the Loring payment.

Q. Did you say anything about its being the Loring payment?

A. Yes, I was talking about the Loring payment.

Mr. THATCHER.—I object, if the Court please.

Mr. WHEELER.—(Q.) Did you use the words—

Mr. THATCHER.—(Intg.) Object on the ground it is incompetent, irrelevant and immaterial; the question is leading; the witness has related the conversation.

The COURT.—I will sustain the objection.

(Testimony of L. A. Friedman.)

Mr. WHEELER.—(Q.) Was anything said in the course of that conversation as to who the payment was to come from that was to be used for the making of the payment referred to by you? A. Yes.

Q. What was said?

A. Well, I stated that we would not have the money until Mr. Loring made his next payment.

Q. Did you use Mr. Loring's name in the course of that conversation with Mr. Thatcher?

A. I did, several times.

Mr. THATCHER.—Objected to as leading; the witness can tell what the conversation was. I move to strike out the testimony.

Mr. WHEELER.—I submit the witness' statement does not purport [525—520] to be a verbatim report of his conversation; he has said when we got the next payment, now I am trying to find out what was said, if anything, as to the source from which the payment was to come.

The COURT.—He has been cautioned two or three times to repeat that conversation, and it seems to me when that particular thing was the gist of what you wanted to bring out, the witness ought to be able to tell that without being led; but I will let you go on and ask the question.

(The reporter reads the question.)

A. Yes.

Mr. WHEELER.—That is all.

(Testimony of L. A. Friedman.)

Cross-examination.

Mr. THATCHER.—(Q.) Where did this take place, Mr. Friedman, this conversation?

A. Right on the street, between the Reno National Bank and the drug store.

Q. And in that conversation you stated to me that you could pay a thousand dollars down and the balance when the Loring payment on the contract, the next Loring payment, was made; is that right?

A. No, I told you that it would be the second payment that was going to be made, because the next payment had to go to the creditors, under our agreement.

Q. You put that in, too, did you, you said the next payment had to go to the creditors?

A. Yes, I did.

Q. What date was that?

A. That was some time between the 1st and 10th of December, 1919.

Q. The first and 10th of December?

A. Yes, I can't just recall the exact day and date.

The COURT.—What year did you say that was?

A. 1919, between the 1st and the 10th of December.

Mr. THATCHER.—(Q.) And that took place in Reno, Nevada. A. Yes.

Q. Between the 1st and 10th of December, 1919?

A. Yes.

Mr. THATCHER.—That is all.

Mr. WHEELER.—That is all, Mr. Friedman.

**Testimony of C. W. Poole, for Defendants
(Recalled.)**

Mr. C. W. POOLE, recalled by defendants, testified as follows:

Mr. WHEELER.—(Q.) Mr. Poole, you made some mention on your cross-examination of some employment or expected employment by the plaintiff Taylor, or the corporation which he was to organize, or some corporation with reference to the mines of the defendant, Nevada Humboldt Tungsten Mines Company; state fully, please, just what was said between you and Mr. Taylor, or between you and any other person in Mr. Taylor's presence upon that subject.

Mr. THATCHER.—I object upon the ground it is indefinite as to date, and that it has already been asked and answered.

Mr. WHEELER.—It has not been asked by me, your Honor, and the matter was brought up for the first time on cross-examination.

The COURT.—You may ask. What was the date and the place?

Mr. WHEELER.—(Q.) What was the date that it took place, the conversation, and any subsequent conversation; if there was more than one conversation, give them all to us, stating when and where the conversation occurred.

A. It occurred the day we signed our first contract with Mr. Taylor in San Francisco, and was in Mr. Thane's office there. After we had signed the

contract, Mr. Thane called me into his private office, and he and I were in there alone for some time; then Mr. Taylor and Mr. Bancroft came in to sign some papers, and as they were signing the papers, Mr. Thane told me the nature of the document they were signing; it was a contract amongst themselves with reference to their deal with us; and Mr. Thane said, "Well, Poole, I am glad the whole matter is over; how do you feel about it"?

The COURT.—Was this a matter that was brought out on cross-examination?

Mr. WHEELER.—It was brought out on cross-examination, your [527—522] Honor.

The COURT.—This conversation?

Mr. WHEELER.—No, not this conversation, but the subject of employment.

The COURT.—I remember there was some testimony about that, but I understood that occurred at the Denver meeting, when he was told that his conduct, or the truth of his statements rather, would have a very serious bearing on his future. I don't remember any examination with reference to a conversation that occurred in San Francisco.

Mr. WHEELER.—There was none, your Honor.

The COURT.—Well, do you think this is redirect examination?

Mr. WHEELER.—I think it is, your Honor. The purpose of it I think perhaps is not obvious to your Honor. My recollection of the record, I have not been fortunate enough to lay my hand on the precise question and answer, but my recollection of

the record is that it might leave room for the argument or the inference that relations of a fiduciary character existed between this witness and Mr. Taylor, and it was for that reason I purposed going into the question as to just what had been said with regard to employment by him in order that the record may be clear upon that point.

(Discussion.)

The COURT.—I haven't the slightest idea that I will consider that testimony when I write an opinion, if I take the time and labor to write out an opinion and dispose of every question in the case, but it may go in, subject to a motion to strike, and if I do consider it at all, it will be in such a way that Mr. Taylor will have the benefit of it; but it does seem to me that the examination should be confined to the matter that was brought out originally.

Mr. WHEELER.—I think your Honor will agree with me that it [528—523] would hardly be fair to have the record left in a shape where the argument could be made or an inference drawn that relations of a fiduciary character existed.

The COURT.—I have not the least idea there were any fiduciary relations existing.

Mr. THATCHER.—Neither have I, your Honor.

Mr. WHEELER.—That is all, Mr. Poole. I accept counsel's statement. [529—524]

Mr. WHEELER.—Mr. Thatcher, I have here what purports to be minutes of the Board of Directors' special meeting of the Tungsten Products Company.

Mr. THATCHER.—Have you or Mr. Davis compared them?

Mr. WHEELER.—I have not; but subject to the same opportunity on your part taken on the minutes offered by you, I will offer them. These are of date of August 16th, 1919. Let them be marked our next exhibit, please.

(Minutes of special meeting of Board of Directors of Tungsten Products Company, dated August 16, 1919, marked Defendants' Exhibit "A-13.")

Mr. WHEELER.—We offer the minutes of the special meeting of the stockholders of the Tungsten Products Company, of August 16, 1919, and ask that they be marked our next exhibit.

(Minutes of special meeting of the stockholders of Tungsten Products Company, dated August 16, 1919, marked Defendants' Exhibit "A-14.")

Mr. WHEELER.—There will be the same stipulation with regard to the minutes of the meeting of the Directors of the Tungsten Products Company, held on the 23d day of August, 1919?

Mr. THATCHER.—That is all right.

Mr. WHEELER.—And we offer it as our next exhibit.

(Minutes of special meeting of Board of Directors of Tungsten Products Company, dated August 23, 1919, Marked Defendants' Exhibit "A-15.")

Mr. WHEELER.—The same stipulation with regard to a meeting of the directors of the Nevada Humboldt Tungsten Mines Company, held on the 23d day of August, 1919.

(Minutes of special meeting of Board of Directors of Nevada Humboldt Tungsten Mines Company, dated August 23, 1919, marked [530—525] Defendants' Exhibit "A-16.")

Mr. WHEELER.—The same stipulation with regard to the minutes of a special meeting of the stockholders of the Nevada Humboldt Tungsten Mines Company, held on the 23d day of August, 1919.

(Minutes of special meeting of stockholders of Nevada Humboldt Tungsten Mines Company, dated August 23, 1919, marked Defendants' Exhibit "A-17.")

Mr. WHEELER.—Minutes of a meeting of the Board of Directors of the Nevada Humboldt Tungsten Mines Company, held on August 23, 1919, same stipulation with reference to it.

(Minutes of meeting of Board of Directors of Nevada Humboldt Tungsten Mines Company, dated August 23, 1919, marked Defendants' Exhibit "A-18.")

Mr. WHEELER.—Same stipulation with reference to the minutes of special meeting of the stockholders of the Nevada Humboldt Tungsten Mines Company, held on the 19th day of April, 1920.

(Minutes of Special Meeting of Stockholders of Nevada Humboldt Tungsten Mines Company, dated April 19, 1920, marked Defendants' Exhibit "A-19.")

Mr. THATCHER.—Are the notices of those meetings in also?

Mr. WHEELER.—No notices are attached thereto. On some of those other documents I have just offered, there is an order of the Board of Directors or stockholders, calling meetings. This document seems to be already in, but your attention, Mr. Thatcher, was not called to the fact that ratifications were attached to the documents shown to Mr. Goodin. The due execution of the instrument is admitted, I take it?

Mr. THATCHER.—Yes.

Mr. WHEELER.—There will be no dispute, I take it, as to the issued number of shares of stock of the Nevada Humboldt Tungsten Mines Company; that is one million shares of the par value of one [531—526] dollar each?

Mr. THATCHER.—That is correct.

Mr. WHEELER.—And the issued shares of the Tungsten Products Company was what, Judge Davis?

Mr. DAVIS.—One hundred thousand, less 320.

Mr. WHEELER.—One hundred thousand, less 320. That is your understanding, Mr. Thatcher, and I ask you to admit it.

Mr. THATCHER.—I think that is correct; it can stand as being correct.

The COURT.—Is all the stock of the Tungsten Company issued?

Mr. WHEELER.—All of the stock of the Nevada Tungsten Mines Company is issued; not all of the stock of the Tungsten Products Company,

the latter being a corporation of 100,000 shares, and 320 shares are not issued.

Mr. THATCHER.—Well, the stock of that company was all owned except the qualifying shares, by the Nevada Humboldt Company.

Mr. WHEELER.—That is something that I cannot tell you about; I can tell you that the stock stood in various names in accordance with the ratification.

Mr. COOKE.—Mr. Friedman, trustee, has 94,680 shares.

Mr. WHEELER.—There seem to be the following stockholders: L. A. Friedman, 1,000 shares; I am told by Judge Davis, that is a mistake upon the document here, it reading 1060 shares; it should be 1,000.

Mr. THATCHER.—My record shows; Friedman, 1,000; Nenzel, 1,000; Jones, 1,000; Huntington, 1,000, and L. A. Friedman, trustee, 94,680.

Mr. WHEELER.—So you will agree with Judge Davis that the number in Mr. Friedman's name is 1,000, and not 1060, as appears in this ratification? I am referring to the ratification annexed to Defendants' Exhibit "A-12." [532—527]

Mr. THATCHER.—Well, can't it be admitted that all of this stock in fact was owned by the Nevada Humboldt Tungsten Mines Company?

Mr. WHEELER.—That I am not prepared to admit; I have not asked the specific question; if it is the fact I will be very glad to admit it. We next

offer in evidence document entitled "Mining Deed," dated August 23, 1919, between Nevada Humboldt Tungsten Mines Company, party of the first part, and W. J. Loring, party of the second part.

(Mining Deed, dated August 23d, 1919, is marked Defendants' Exhibit "A-20.")

Mr. WHEELER.—The next is a deed dated the 23d day of August, 1919, between the Tungsten Products Company and W. J. Loring.

(Deed between Tungsten Products Co. and W. J. Loring, dated August 23, 1919, is marked Defendants' Exhibit "A-21.")

Mr. THATCHER.—Is not that admitted, Mr. Wheeler?

Mr. WHEELER.—I am not certain it is admitted. You claim certain instruments were executed, and you question their validity; I think the form of each of the documents should be here in order to show just what property was conveyed; and also to show that valid instruments were executed and delivered.

The next is a deed dated August 23, 1919, between Nevada Humboldt Tungsten Mines Company, and W. J. Loring.

(Deed from Nevada Humboldt Tungsten Mines Co. to W. J. Loring, dated August 23, 1919, is marked Defendants' Exhibit "A-22.")

Mr. WHEELER.—The next is an assignment, dated the 23d day of August, 1919, from Nevada Humboldt Tungsten Mines Company to W. J. Loring.

(Assignment from Nevada Humboldt Tungsten Mines Co. and Tungsten Products Co. to W. J. Loring, dated August 23, 1919, marked Defendants' Exhibit "A-23.") [533—528]

Mr. WHEELER.—The next is a Bill of Sale, dated the 23d day of August, from the Nevada Humboldt Tungsten Mines Company to W. J. Loring.

(Bill of Sale, Nevada Humboldt Tungsten Mines Co. to W. J. Loring, dated August 23, 1919, is marked Defendants' Exhibit "A-24.")

Mr. WHEELER.—The next is a mortgage to secure purchase price, dated August 23, 1919, executed by W. J. Loring, the mortgagor, to the Nevada Humboldt Tungsten Mines Company and the Nevada Tungsten Products Company, mortgagees.

(Mortgage to Secure Price, dated August 23, 1919, is marked Defendants' Exhibit "A-25.")

(A short recess is taken at this time.)

Mr. WHEELER.—We also offer in evidence the Book of By-laws of the Nevada Humboldt Tungsten Mines Company. Is there any objection to that, Mr. Thatcher?

Mr. THATCHER.—No.

(Book of By-laws of Nevada Humboldt Tungsten Mines Co. is marked Defendants' Exhibit "A-26.")

Mr. WHEELER.—I think the pleadings in case B-1 have not been offered formally. That is the suit brought by Mr. Taylor to set aside the transaction, suit brought October 27, 1919. I would like the complaint and the pleadings therein deemed

(Testimony of W. J. Loring.)

read. Mr. Loring is a party to that suit, your Honor.

Mr. THATCHER.—No objection.

Mr. WHEELER.—I do not recall that the affidavit of Mr. Taylor that was used upon the order to show cause has been formally offered. That was the affidavit in which he verifies the complaint in this action. I would like to have that considered as read.

Mr. THATCHER.—Well, I object to that on the ground it is incompetent, irrelevant and immaterial. Mr. Taylor is here, and testified; it is nothing more nor less than a verification at the most.

Mr. WHEELER.—A declaration, we claim, against interest.

The COURT.—It may be admitted. [534—529]

Testimony of W. J. Loring, for Defendants.

Mr. W. J. LORING, one of the defendants, called as a witness on behalf of the defendants, after being sworn, testified as follows:

Direct Examination by Mr. WHEELER.

Q. Mr. Loring, you are one of the defendants in this action? A. I am.

Q. Were you present in court when Plaintiff's Exhibit 28, purporting to be a telegram from David Taylor to you, was placed in evidence? A. I was.

Q. Are you familiar with the contents of that telegram? A. I am.

Q. I hand you Plaintiff's Exhibit 29, and ask you

(Testimony of W. J. Loring.)

if you recall sending that telegram in answer to Plaintiff's Exhibit 28?

A. Yes, I know that telegram.

Q. I call your attention to the words of your telegram: "I hold option on Nevada Humboldt interests." Examine the document which I now place in your hands, dated July the 21st, with the signature W. J. L. appearing there; I ask you whether or not that is a letter-press copy of a letter addressed by you to L. A. Friedman, President Nevada Humboldt Tungsten Mines Company, on the 21st day of July, 1919? A. It is.

Q. W. J. L. being your initials? A. Yes, sir.

Q. And the original was signed by you, was it?

A. Yes, it was.

Q. I call your attention to a document dated July 21, 1919, bearing several signatures, and ask if that was received by you in reply to the document which you have just identified, which document is dated July 21, 1919? A. Yes, it was received by me.

Q. State whether or not this is one of the documents referred to by you as constituting an option on Nevada Humboldt interest referred [535—530] to in your telegram, Plaintiff's Exhibit 29?

A. It is.

Mr. WHEELER.—We offer it in evidence.

Mr. THATCHER.—I object to it on the ground the document does not constitute any option or contract made by the Nevada Humboldt Tungsten Mines Company under its seal or by its authority; and it is not shown to be made by the authority of

its stockholders or directors, or any managing board of said corporation.

Mr. WHEELER.—Do you claim that it was not made by the authority of such board of directors?

Mr. THATCHER.—It does not show.

Mr. WHEELER.—I know, but do you dispute the fact; perhaps we can have an admission.

Mr. THATCHER.—No, I don't know; I am frank to say I don't know; that is a matter for you to prove.

Mr. WHEELER.—We do not offer it as constituting an option in law; I offer it as constituting one of the documents referred to by the witness in his telegram; whether it is in law an option, is a different question.

Mr. THATCHER.—I don't object if offered for that purpose, as being a document or documents to which he referred in his telegram.

Mr. WHEELER.—That is very satisfactory to me; in fact, I will admit it was never formally executed by the corporation, or ever authorized by the corporation: (Reads:)

“Lovelock, Nevada, July 21st, 1919. L. A. Friedman, President Nevada Humboldt Tungsten Mines Company, and Tungsten Products Company, Lovelock, Nevada. Dear Sirs: I beg to confirm my conversation with you this morning with reference to an option that I wish to secure from you and your associates upon the property of [536—531] the Nevada Humboldt Tungsten Mines Company, Tungsten Products Company and also the interest of the

Mill City Development Company, which I understand to be as follows:

“I understand that the total indebtedness of the company, at the present time, is about \$200,000, and it is my understanding that the first payments made are to be for the purpose of liquidating the indebtedness referred to, and should it be found that a larger sum than \$200,000 will be necessary to liquidate the indebtedness of the company, that the same shall be taken from the payments that will follow after \$200,000 has been received by yourselves. These payments are to be made on the following dates, for the following amounts, namely: 4th of August, 1919, \$50,000—and so on with various dates, making a total of \$333,333.33—

“It is understood by me that any money that may be received from the government, as relief under the War Minerals Relief Bill, shall be for the benefit of the purchasers of your company and its rights, and that all concentrates on hand, or in transit, and all monies owing to the company at the time of making the first payment shall belong to the purchasers. Also, whatever amount is secured from the government as relief under the War Minerals Relief Bill it is understood shall be applied immediately to the liquidation of indebtedness; the payment of indebtedness next coming due in accordance with the terms of this agreement.

“It is also understood that no part of the agreement is to be considered an option except that part from the date hereof until the 4th of August, 1919, during which time I am to make such preliminary

(Testimony of W. J. Loring.)

arrangements as I may see fit for further carrying into effect the terms of this agreement, or abandoning the same. I might state here, that I may find that two weeks will be inadequate for me to make the necessary financial arrangements for carrying this agreement into effect, and should I find it necessary to ask for an extended few days, I dare say that that time will be granted me, providing that I show good faith in my actions from this occasion to the end of the two weeks period referred to.

“It is understood that should at the end of the two weeks period referred to that this agreement is to be put into effect, that it will be confirmed by properly drawn up legal document.

“With kindest regards, I remain, Faithfully yours, W. J. L.”

Annexed to this is a document signed by individuals:

“The price terms and conditions, as outlined in your letter, are satisfactory to us and we hereby grant you this option.” Signed by L. A. Friedman, C. W. Poole, C. W. Jones, G. H. Hinch, R. Nenzel and Lena J. Friedman.

Q. I hand you a document dated the 9th day of August, 1919—this your Honor will observe is July 21st—and ask you to examine the [537—532] same and state whether or not that is a letter-press copy of a document signed by you, and sent to the person to whom it is addressed?

A. Yes, this is a carbon copy of the letter.

Q. Sent at that date? A. Sent at that date.

(Testimony of W. J. Loring.)

Q. And is the other document, dated August 9th, signed by L. A. Friedman and others, the reply thereto? A. It is.

Q. And was that reply given to you at that date?

A. It was.

Mr. THATCHER.—This is for the purpose of showing his relation to them at the time of the Taylor telegrams and correspondence?

Mr. WHEELER.—It is offered as the option referred to in the telegram dated August 12th, being a part of the documents referred to by the witness when he says, “I hold option on Nevada Humboldt interest.”

Mr. THATCHER.—I object to it on the ground it is nothing more or less than negotiations which led up to the execution of the contract itself, between the corporation and Mr. Loring; and that it is purely self-serving declarations as between the parties, and does not in any way bind the plaintiff in this action; that it is not an option or a contract in its present, or any other form.

The COURT.—It seems to me the only effective use of this testimony is to explain why this option was not dated, or was not really executed until after these telegrams, and that the negotiations were in progress before the telegrams were received. I think I will sustain the objection on the ground it is not necessary. It seems to me that is explained already without putting in anything further; I think you have established that fully, and explained

(Testimony of W. J. Loring.)

it. If it becomes a point that is disputed, I shall consider it later, but I don't suppose it will be.

Mr. WHEELER.—Let this be offered and marked as our exhibit. [538—533]

(Letter to L. A. Friedman, signed W. J. L., dated July 21st, and reply, marked Defendants' Exhibit "A-27.")

Mr. WHEELER.—The point is to rebut any inference that this witness had entered into this contract before he had before him David Taylor's attitude with regard to bringing suit, either for specific performance or for damages.

The COURT.—I don't see but what you have fully established that, unless it is disputed.

Mr. WHEELER.—Our proposition is this: Witness did not enter into this contract, dated August 16th, 1919, already offered here in evidence, for the purchase of these properties of the defendant corporations, and of one-half of the stock of one of the defendant corporations, until the suit 2263 had been filed in this court, and until knowledge of that suit had been brought home to this witness, and he was aware of the fact.

Mr. THATCHER.—I am not willing to admit that, to make an admission of that kind.

The COURT.—Go on and put the testimony in then.

Mr. WHEELER.—We offer them the letter of August 9th.

The COURT.—The testimony will go in, of course, subject to your objection.

Mr. THATCHER.—I object on the ground they are incompetent, irrelevant and immaterial, and merely negotiations which occurred between the parties prior to the execution of the contract, and that they are not in form or substance or in fact or in law options or contracts entered into by Mr. Loring, which in any way bound him at any time prior to the time that he had knowledge of any action or intention of acting, of Mr. Taylor's.

Mr. WHEELER.—In that objection there is coupled an admission that there was nothing that bound the defendant Loring in any manner [539—534] nor until after Mr. Taylor had brought his suit.

Mr. THATCHER.—If there is coupled any such admission I would like to withdraw it, because I make no such admission.

Mr. WHEELER.—I think if it is read you will find that is the effect of it.

The COURT.—Well, the objection is overruled, and you are offering it for no other purpose than that; you are not offering it as preliminary negotiations?

Mr. WHEELER.—Not at all.

The COURT.—And it is not admitted for that.

Mr. WHEELER.—I am willing that it be confined to other purposes than that stated by counsel.

The COURT.—I will state, General Thatcher, I think your objections are good, and that the testimony cannot be considered for the matters that you are objecting to.

Mr. WHEELER.—I also agree with counsel on

(Testimony of W. J. Loring.)

that, your Honor. I will state briefly that the document dated August 9th refers to the letter of the 9th of August annexed thereto, and that it modifies in some respects the proposed terms of the purchase of the properties in question, and shows that the matter was still in process of negotiation on the 9th day of August, 1919, and that nothing had on that date been concluded.

(Letter to L. A. Friedman signed W. J. L., dated August 9th, 1919, and reply thereto are marked Defendants' Exhibit "A-28.")

Mr. WHEELER.—(Q.) Mr. Loring, you are acquainted with Mr. Booth B. Goodman of Lovelock, Nevada? A. I am.

Q. Did you at any time before the signing of the document, the contract entered into between you and the defendant corporations here in evidence, learn, or know, or receive information to the effect that a suit had been filed by Mr. Taylor against L. A. [540—535] Friedman and others, for damages? A. I did.

Mr. THATCHER.—Now, Mr. Wheeler, subject to my objection that all this testimony is incompetent, irrelevant and immaterial, I am willing to admit these telegrams were sent to Mr. Goodman, and that he responded on the dates there shown, and that he made the investigation as Mr. Loring's attorney, under the direction I think of Mr. Davis, is that right?

Mr. WHEELER.—No, under the direction of both Mr. Loring and Mr. Davis.

Mr. THATCHER.—Well, I will make it that way; and object to the testimony as incompetent, irrelevant and immaterial to any of the issues in this case, not constituting a defense.

Mr. WHEELER.—Coupled with that also, and to save me further investigation along this line, will you admit that there first came a telegram from Mr. Goodman to Mr. Loring, advising Mr. Loring that the suit in question had been brought?

Mr. THATCHER.—Have you the telegram?

Mr. WHEELER.—I haven't it here. I can ask for it. Find it for me, Mr. Davis.

Mr. THATCHER.—I will admit those were sent.

Mr. WHEELER.—That those two were sent; and that he had previously heard that the suit had been brought, but did not know its nature.

Mr. THATCHER.—Yes, I will admit that.

Mr. WHEELER.—It is admitted that previous to the sending of this wire dated August 19th, the defendant Loring had learned that a suit had been brought by Mr. Taylor, but did not know its nature, and that thereafter upon request from Mr. Goodman for further information, the wire dated August 19th, about to be offered in evidence, was received by Mr. Loring; that thereafter upon a request from Judge [541—536] John F. Davis, an attorney for Mr. Loring, for further information, the telegram dated August 19th was sent, and that the telegram itself was exhibited to Mr. Loring.

Mr. THATCHER.—I will admit that.

Mr. WHEELER.—We offer them in evidence.

(Telegram dated August 19, 1919, to W. J. Loring from Booth B. Goodman, is marked Defendants' Exhibit "A-29," and the telegram dated August 19, 1919, from Booth B. Goodman to Judge John F. Davis, is marked Defendants' Exhibit "A-30," and are read by counsel for defendant as follows:

"Lovelock, Nevada, Aug. 19th, 1919.

"W. J. Loring,

614 Crocker Bldg.,

San Francisco, Calif.

"Have personally inspected all papers served in Friedman cases stop one case is against the individuals on alleged misrepresentations and does not in any way effect us stop the second is against the tungsten mine and mill corporations for nine thousand dollars stop writ of attachment issued against company properties in second suit but Friedman and associates are furnishing bond which will prevent service of writ stop the suits in their present status will not in any way interfere with our deal stop will keep you advised of any new development stop am mailing copies of papers to Judge Davis.
BOOTH B. GOODMAN."

Mr. WHEELER.—The telegram addressed to Judge Davis by Mr. Goodman is as follows:
(Reads.)

"Replying your wire Taylor suits pray for straight money judgment only stop suit against companies demands nine thousand as balance for money loaned to the corporations and which was secured by hundred tons of concentrates stop plain-

(Testimony of W. J. Loring.)

tiff alleges that security was insufficient and balance is due stop other suit in [542—537] against Friedman and associates as individuals based on allegation that upon representations by defendants plaintiff rendered services and expended money in an effort to raise money for the corporations in consideration for which he has to receive sixty-two per cent of capital stock stop that said representations were false in regard to developed tonnage stop allege damages caused by reason of said alleged misrepresentations which made it impossible to carry out contract after discovery thereof see wires to Loring.

BOOTH B. GOODMAN.”

Mr. WHEELER.—(Q.) Mr. Loring, was the contract dated the 16th day of August entered into by you on that day? A. Yes.

Mr. THATCHER.—I suppose he means that he signed it on that day?

Mr. WHEELER.—You mean you signed it on that day? A. I did.

Q. Was that before or after there had come to your knowledge the contents of the two telegrams just offered in evidence? A. Afterwards.

Q. Was it before or after you had received and knew the contents of Mr. Taylor's telegram to you, offered in evidence, in which he makes mention of a possible suit for specific performance, or as an alternative, a suit for damages? A. After.

Q. Did you pay any money on account of this

(Testimony of W. J. Loring.)

transaction to any person, persons or corporation at any time prior to the first day of September, 1919?

A. I did.

Q. I mean any payment on account of the purchase price of the properties; if so what was it and on what day?

A. I made an advance prior to the first day of September, 1919.

Q. On what day did you make the advance, do you remember? A. I don't remember.

Q. That was an advance against concentrates, was it not? [543—538]

A. No, it was not; it was an advance to liquidate certain debts that Mr. Friedman informed me were very pressing, and in place of waiting till the first of September, I advanced seventeen thousand odd dollars prior to that date.

The COURT.—(Q.) \$17,000 prior to the first day of September? A. Yes, your Honor.

Mr. WHEELER.—(Q.) And in addition to that \$17,000, how much did you pay on the first day of September?

A. The balance of \$50,000, making the total \$50,000.

Q. And those two payments make up the first payment under the contract in question?

A. They do.

Q. Did the plaintiff Taylor, or any person representing him, ever tell you at any time prior to the making of any of the said payments, at any time subsequent to the telegram from Taylor to you,

(Testimony of W. J. Loring.)

dated August 10, 1919, that he intended to or contemplated, or would bring any suit for specific performance? A. He did not.

Q. I think I asked this question in substance, but I am not sure, so I will repeat it for the sake of the record, in any event. Did you pay any part of the said \$50,000 at any time prior to the 19th day of August, 1919?

A. I don't remember. Myself and a partner in some of my affairs had loaned Mr. Friedman's company \$10,000, and that ten thousand loans was secured by thirty tons of concentrates, and that money was used for the purpose of paying off the labor on the mine.

Q. That was ten thousand dollars?

A. Ten thousand dollars of the seventeen thousand referred to a while ago.

Mr. THATCHER.—(Q.) A part of the seventeen thousand?

A. A part of the seventeen thousand.

Mr. WHEELER.—(Q.) When was the remaining seven thousand dollars furnished, or was the seventeen thousand in addition? [544—539]

A. No, the ten thousand dollars is a part of the seventeen thousand the seventeen thousand was advanced, and that paid me back my loan.

Q. Of ten thousand dollars?

A. Yes, of ten thousand dollars.

Q. What form did that transaction take; was it a loan, a purchase by you of claims, or what was it?

(Testimony of W. J. Loring.)

A. That was a loan.

Q. To whom did you loan the money?

A. I loaned it to the Nevada Tungsten Mines Company.

Q. Did you take any obligation for it?

A. They delivered to me thirty tons of concentrates.

Q. I mean out of the seventeen thousand dollars?

A. I don't understand the question.

Q. As I understand you, you first loaned ten thousand dollars, and received as security thirty tons of concentrates? A. That is right.

Q. That later on seventeen thousand dollars was advanced by somebody, and you got back your ten thousand dollars, is that right?

A. That is right; I advanced the seventeen thousand.

Q. How was the seventeen thousand dollars advanced, to whom was it paid?

A. That was paid on account of the purchase of this property.

Q. And when was it paid, according to your best recollection?

A. I don't remember that date, but the record shows.

Q. Was it before or after the contract of the 16th was signed?

A. Oh, it was after the contract was signed.

Q. Was it before or after the receipt by you of the telegram from Mr. Goodman? A. After.

Q. And it then went in to make up a part of the

(Testimony of W. J. Loring.)

first payment, and was so considered when the payment of the first of September came due, and was finally liquidated, is that right? [545—540]

A. That is right.

Mr. WHEELER.—You may take the witness.

Cross-examination.

Mr. THATCHER.—(Q.) Will you tell me the date on which you made the loan of ten thousand dollars on concentrates? A. I cannot.

Q. Have you your books here that would show that, Mr. Loring?

A. I suppose we have records here that will show it, I am not certain.

Q. Will you at the noon recess look up your records and ascertain for me the date when you advanced the ten thousand dollars?

A. I can get it for you, if not here, in San Francisco.

Q. Was a note given to you for that, a corporation note? A. I am not certain.

Mr. THATCHER.—Will counsel inform me whether or not a note was given, and if there was, will they produce it.

Mr. WHEELER.—I know there was a company transaction, what form it took I do not know.

Mr. THATCHER.—Will you also get for me the exact time of the payment of the seventeen thousand dollars?

WITNESS.—I will.

Q. Did you meet Mr. Taylor and take breakfast

(Testimony of W. J. Loring.)

with him in the Belmont Hotel in New York, about June 25th?

Mr. WHEELER.—It is not cross-examination, but I do not object to it upon that ground, your Honor.

The COURT.—Well, proceed then.

A. Mr. Taylor had breakfast with me at the Belmont Hotel.

Mr. THATCHER.—(Q.) I mean did you and Mr. Taylor take breakfast together at the Belmont Hotel? A. We did.

Q. About what date was that? [546—541]

A. Sometime after the middle of June, I should say.

Q. Would you say the 20th or 25th of June?

A. Perhaps at that time, I could not say.

Q. Did you at that time discuss with Mr. Taylor the Nevada Humboldt Tungsten Mines Company property? A. Casually, yes.

Q. Did he at that time tell you he was going to bring an action against the Nevada Humboldt, or its stockholders? A. He did not.

Q. Did he not at that time inform you he was about to bring an action against the Nevada Humboldt and the defendants Friedman, Poole, Murrish and others here defendants, and did you not at that time say that you would keep your hands off of the Nevada Humboldt? A. I did not?

Q. You didn't have that conversation in substance and effect?

A. Not anything pertaining to it.

(Testimony of W. J. Loring.)

Mr. THATCHER.—That is all.

Redirect Examination.

Mr. WHEELER.—(Q.) Was anything said on that occasion by Mr. Taylor with regard to the Nevada Humboldt Tungsten Mines Company? A. Yes.

Q. What did he say and what was the conversation?

A. It was well known to all of us doing tungsten business—

Mr. THATCHER.—I move to strike that out.

Mr. WHEELER.—(Q.) Just say what he said, and what you said, if anything.

A. We discussed money matters pertaining to the sale of the market of tungsten; and I asked him, among other things, how he was getting on with his work at the Friedman mine, as it was known at that time, and he told me that the mine had not developed in accordance with his anticipations; and I remember distinctly that he told me that [547—542] the mine had developed 19,800 tons of ore, but by a stretch of imagination he could bring it up to twenty-three thousand odd tons. I don't remember the exact tonnage that he had set out to develop—a larger tonnage; "Well," I said, "Then you don't propose to go on with the deal?" He said "I do," he said, "I am going to take the mine away from the boys," or "away from Friedman," or something to that effect, and looked me right in the eye when he said it. That was about the end of our conversation.

Q. You have been, Mr. Loring, interested in a

(Testimony of W. J. Loring.)

mine situate near this property for some time, have you not? A. Yes, I have.

Q. What is the name of that mine?

A. Pacific Tungsten mine, owned by the Pacific Tungsten Mining Company.

Q. Is that an adjoining property? A. It is.

Q. And you were interested in that property all during the year of 1919, were you not?

A. Yes, sir.

Q. Had you ever seen or known of the terms of the document Exhibit "C" annexed to plaintiff's complaint, being Mr. Taylor's contract with certain stockholders of the defendant Nevada Humboldt Tungsten Mines Company, dated April 2d, 1919? A. I had never seen it.

Q. You knew nothing of the terms of that contract prior to entering into the contract of the 16th day of August, 1919? A. I did not.

Q. There was one little matter in your testimony; I asked you if you had entered into the contract of the 16th of August prior to or after receiving Mr. Goodman's telegram, dated the 19th day of August; what is the fact with regard to that?

A. Well, the dates speak for themselves, I don't remember.

Q. At any rate, the contract of the 16th was entered into on the [548—543] 16th, and your telegram from Mr. Goodman possibly did not come until after you had entered into the contract?

A. I remember distinctly when that contract was executed, but I don't remember the other date.

(Testimony of W. J. Loring.)

Q. Did the plaintiff Taylor say anything with regard to whether or not the defendant corporations, or any or either of them, were solvent or insolvent in your conversation with him in New York?

A. I don't recall any such conversation.

Mr. WHEELER.—That is all.

(By Mr. COOKE.)

Q. Did he say anything about how he was going to take the property away from the Friedman people? A. He did not.

Q. Didn't he go into that phase of it?

A. He did not.

Q. You have related the conversation as nearly as you can recall it?

A. Absolutely word for word, I believe.

Mr. COOKE.—That is all.

Mr. THATCHER.—That is all, except with reference to the matters requested. I asked the witness to produce some checks and memoranda to show the dates when the amount of \$10,000 was advanced on thirty tons of concentrates?

Mr. WHEELER.—That is all for the present, Mr. Loring. Have counsel the documents referred to in the course of the testimony of Mr. Poole, as being documents indicating Mr. Bancroft's method of computation?

Mr. THATCHER.—I think we have; that is, I don't know whether we have the documents, but we are making a search for them. Mr. Taylor recollects of having had, or known in general what Mr. Bancroft's method was, and we have been

searching through the papers. We have some more papers in my files, and we will make a further search. [549—544]

Mr. COOKE.—There is another document of some kind, used by Mr. Murrish in redrafting?

Mr. THATCHER.—We didn't have that; that went into the waste-basket that evening.

Mr. WHEELER.—Is it disputed on an occasion when there was a discussion between Mr. Taylor and Mr. Poole in Denver, there were certain documents or memoranda containing what purported to be Mr. Bancroft's method of computation?

Mr. THATCHER.—I am not even sure about that; that is what we are looking for. Mr. Taylor had been informed, either by letter or otherwise, of a method which might be used by him, informed by Mr. Bancroft of the method of computation of tonnage.

Mr. WHEELER.—It is apparent that there must have been some conversation between these gentlemen of some kind, or else it could not have been known to Mr. Taylor, or that Mr. Taylor had some letters or documents.

Mr. THATCHER.—No question about that.

Mr. WHEELER.—Can we not go further and say on some occasion, the 30th or 31st of March, or the 1st or 2d of April, when these gentlemen were together in Denver, that those documents were produced, and before them.

Mr. THATCHER.—I am not so sure about that; but that method of calculation was present, that

(Testimony of W. J. Loring.)

is what I will admit; whether there were any documents or not, I don't recollect. So far as we can ascertain, they had their offices together, and had on various occasions conversations, but whether a memorandum made by Mr. Taylor whether he carried it in his memory, or had a letter, I am not sure; we are looking through the papers.

Mr. WHEELER.—Let us see if we cannot save time this afternoon by admitting this: Will you admit there was a conversation between [550—545] them in Denver on one of those days with regard to Mr. Bancroft's method of computation, and that in some manner, either orally or through documents, that method was made known to Mr. Poole by Mr. Taylor?

Mr. THATCHER.—Yes, I think I can admit that.

Mr. WHEELER.—Then we are content to rest with that admission on the statement of our witness that the documents were there.

(At 12 o'clock a recess is taken until 1:30 P. M.)

AFTER RECESS—1:30 o'clock, P. M.

W. J. LORING, recalled for further direct examination.

Mr. WHEELER.—(Q.) Mr. Loring, you spoke this morning about a certain sum of seventeen thousand odd dollars which entered into the first payment made by you on September 1st; did that sum consist of money loaned by you to the defendant corporations, or either of them, or did it come up

(Testimony of W. J. Loring.)

in some way through the purchase of claims against some one of those corporations?

A. Purchase of claims.

Q. Examine, if you please, the two documents which I hand you, and state whether or not they are the assignments of the claims making up that item of seventeen thousand and some dollars, and upwards?

(Hands to witness.)

A. Yes, they are.

(The papers are handed to counsel for plaintiff.)

Mr. THATCHER.—No objection.

Mr. WHEELER.—We offer the two documents in evidence. One of them is an assignment from the Rochester Mines Company of a claim of \$13,-158.52, to W. J. Loring, being a claim against the Nevada [551—546] Humboldt Tungsten Mines Company.

(The assignment is marked Defendant's Exhibit "A-31.")

Mr. WHEELER.—The next is an assignment of \$4211.63, a claim for that amount against the Nevada Humboldt Tungsten Mines Company, also to W. J. Loring.

(The assignment is marked Defendants' Exhibit "A-32.")

Mr. WHEELER.—(Q.) I call your attention to your contract with the Nevada Humboldt Tungsten Mines Company, and to the following provision therein: "It is further understood and agreed that the said party of the second part shall receive

(Testimony of W. J. Loring.)

credit upon the installment of the purchase price falling due on the first day of September, 1919, for the sum of \$13,158.52, being the amount of a certain claim against the Nevada Humboldt Tungsten Mines Company assigned by Rochester Mines Company, a Nevada corporation, to the party of the second part, and also for the sum of \$4211.62, being the amount of a certain claim against the Nevada Humboldt Tungsten Mines Company, assigned by Rochester Combined Mines Company, a Nevada corporation, to the party of the second part; said claims or accounts now being the property of the party of the second part and due and owing to him." Do you recall that declaration of the contract. A. I do.

Q. What claims are there referred to?

A. The claims covered by these assignments.

Q. When you testified this morning to a claim for \$17,000 and upwards, to what had you reference?

A. To the assignment of these two claims by the Rochester companies.

A. It was not then a payment on account you had previously made, prior to the first day of September? A. No, it was not.

Q. The amounts of these two claims which belong to you were by this agreement made a part of the September 1st payment? A. That is right.
[552—547]

Q. You spoke this morning about \$10,000 which you had advanced against concentrates, I call your attention to the following provision of this con-

(Testimony of W. J. Loring.)

tract: "All payments of the installments of the purchase price above set forth shall be made in cash, or by certified check, or by cashier's check, or bank telegraph transfer, to the credit of the parties of the first part, at the First National Bank of Lovelock, Nevada, by payment thereof to its cashier, J. T. Goodin, who is trustee for the creditors of said parties of the first part, who shall first pay off the loan of \$10,000 procured to pay off labor claims, and shall thereafter pay out said installments so received to said respective creditors in accordance with his trust." State whether or not that is the ten thousand dollar item referred to by you in your testimony this morning?

A. It is.

Q. That was the \$10,000 which you had loaned against certain concentrates? A. Yes.

Q. Was it or was it not a payment on account at the time that you handed it over to the party obtaining the same?

Mr. THATCHER.—I object to that as calling for the conclusions of the witness, and leading.

Mr. WHEELER.—(Q.) Well, state the circumstances under which you advanced that money, and whether or not it was a payment on account of this contract?

A. That was a private loan to this company to pay off their labor that they were behind in, and no part of this contract at all.

Q. You took security for it?

A. I took security of thirty tons of concentrates.

(Testimony of W. J. Loring.)

Q. How were you paid the amount of that loan?

A. I had the privilege of retaining the concentrates or accepting \$10,000 out of the first payment on the first of September. [553—548]

Q. As a matter of fact, what took place on the first of September, how much money on that day was first paid in to the defendant corporations by you under your contract with them?

A. Fifty thousand dollars.

Q. Made up how?

A. Made up by these two assignments, and the balance in cash.

Q. By the two assignments you mean \$17,000?

A. \$17,000 and upwards.

Q. Then after the balance had been paid in in cash, how did you receive your \$10,000?

A. A check was passed through the bank, I believe, at Lovelock to the credit of myself.

Q. Who did it come from? A. J. T. Goodin.

Q. Was that payment of \$10,000 made pursuant to the following provision of the contract, after certain recitals to the effect that the payment was to be made to J. T. Goodin as trustee for the parties of the first part, then quoting: "Who shall first pay off the loan of \$10,000 procured to pay off labor claims"? A. That is the fact.

Q. It was paid pursuant to that provision?

A. It was.

Mr. WHEELER.—That is all.

Cross-examination.

Mr. THATCHER.—(Q.) I take it then the pur-

(Testimony of W. J. Loring.)

pose of this is to correct your testimony of this morning? A. Yes, it is.

Q. And that you were mistaken as to the details? A. Yes, I had forgotten about it.

Mr. THATCHER.—With the production of these matters it is unnecessary to produce any checks or other items called for.

Mr. WHEELER.—You don't care for them?

Mr. THATCHER.—No, we don't care for them, because this gives us the facts. [554—549]

Mr. THATCHER.—(Q.) Mr. Loring, I call your attention to a letter of date of September 25th, and ask you if you ever saw that letter before?

A. No, I haven't seen that letter before; that was signed by my office manager.

Q. It came out of your office, did it? A. Yes.

Q. One of your letter-heads? A. Yes.

Q. Do you know under whose direction it was sent?

A. My office manager takes care of them.

Q. Your office manager takes care of them?

A. Yes.

Q. Under your instructions?

A. All the matters in my office are under my instructions.

Mr. THATCHER.—We ask to have it marked for identification, if the Court please.

(Letter dated September 25, 1919, from W. J. Loring to Howland Bancroft, is marked Plaintiff's Exhibit No. 51 for identification.)

Mr. THATCHER.—That is all, Mr. Loring. [555—550]

Mr. WHEELER.—I am not certain that the suit by Mr. Taylor against the Nevada Humboldt Tungsten Mines Company for a recovery, according to its prayer, of between nine and ten thousand dollars, being the same suit that was settled for \$7,000, has been testified to here.

Mr. THATCHER.—Are you offering the record?

Mr. WHEELER.—I am offering the record.

Mr. THATCHER.—I don't like to see the record in this case so much encumbered. Can't we agree on the facts?

Mr. WHEELER.—I think that record ought to be in, and if it ever comes that either party desire merely to have its substance stated, we can arrange for that.

Mr. COOKE.—Number 2262 is the suit for the nine thousand dollars.

Mr. THATCHER.—We object as incompetent, irrelevant and immaterial to any of the issues in this case, or any defense of the defendants, or any of them.

The COURT.—Did you object to the complaint and the answer?

Mr. THATCHER.—In the damage suit?

The COURT.—No, the suit that was settled. You have introduced part of the record in that case, have you not?

Mr. WHEELER.—Not part of the record; at least I did not. 2262 is the one for \$9,000, and

2263 is the one we are depending on for the basis of our defense.

The COURT.—I thought that went in this morning without objection, to what issue is that record offered?

Mr. WHEELER.—That is upon an election; that the suit was brought, that it passed to judgment, and that it was subsequently paid with Mr. Loring's money.

The COURT.—Why can't you admit that? If that is the only thing, simply that it is offered on that issue, I don't see why you can't [556—551] admit the very language of your pleadings. This is getting to be an enormous record.

Mr. WHEELER.—I think that can be done. I would like before having it considered as foreclosing us, to look through that once more, but that I can do at another time, before argument.

Mr. THATCHER.—I am willing to admit that the suit was brought, and that judgment pursuant to stipulation—

The COURT.—You admit his allegations in the complaint?

Mr. THATCHER.—No, I don't want to admit it was paid with Mr. Loring's money, or that we knew that it was his money; that part I don't admit. I will admit the suit was brought, admit the amount was paid, but do not admit it was Mr. Loring's money, or that we knew it was Mr. Loring's money.

Mr. WHEELER.—Let me suggest this: That the suit was brought to recover a balance of \$9,000 and upwards, alleged by the plaintiff Taylor to be due to him because of advances made pursuant to Exhibit “A,” attached to plaintiff’s complaint; that the suit resulted in a settlement and judgment of dismissal for the sum of \$7,000, and that that is the suit wherein the moneys represented by the checks offered in evidence this morning were paid in the manner heretofore testified.

Mr. THATCHER.—I don’t care to stipulate to that; that is rather broad; but it was paid, and paid by the checks here identified, and in the manner stated.

Mr. WHEELER.—And the suit was one brought by Taylor against the Nevada Humboldt Tungsten Mines Company to recover a sum of \$9,000 and upwards, alleged to be a balance due for advances made under the contract Exhibit “A” annexed to plaintiff’s complaint—what is known as the ore-buying contract.

Mr. THATCHER.—That is all right.

Mr. WHEELER.—I am not sure that the entire record in B-1 is in. [557—552] The complaint is in. If not, we desire to have the entire record considered as read. We next offer in evidence a bill of sale from the Nevada Humboldt Tungsten Mines Company to W. J. Loring, dated the 23d day of August, 1919, of a certain water power contract. (Bill of sale, Nevada Humboldt Tung-

sten Mines Co. to W. J. Loring, dated August 23d, 1919, marked Defendants' Exhibit "A-33.")

Mr. THATCHER.—No objection.

Mr. COOKE.—In regard to the claim of Hugh F. Watts for \$299.70, Mr. Thatcher, is that the correct amount?

Mr. THATCHER.—I could not say; we think it is.

Mr. COOKE.—We have a statement of account rendered to the Nevada Humboldt Tungsten Mines Company, \$299.70; I suggest this stipulation to cover that: That that was paid on or about July 1, 1919, by Mr. David Taylor, and an assignment of that account taken by him.

Mr. THATCHER.—I will admit that that is the fact.

Mr. COOKE.—You haven't the assignment here with you?

Mr. THATCHER.—We have it, but I think it is over in Reno. We will admit that is the fact, and object merely to the admission or consideration of it as evidence, on the grounds that it is not within any of the issues, does not constitute any defense to the action in this case on behalf of the defendant, and incompetent, irrelevant and immaterial.

Mr. COOKE.—You are willing to include in the stipulation that that account was a claim by Watts against the Nevada Humboldt Tungsten Mines Company?

Mr. THATCHER.—Yes, I will admit that, and I will admit that it has never been paid.

The COURT.—To what issue is that?

Mr. COOKE.—In connection with the allegations of the answer that David Taylor at or about this time was engaged in an effort to get [558—553] in the accounts against the Nevada Humboldt Tungsten Mines Company in his own name, for the purpose of being used in a coercive way to aid him in accomplishing his object in getting that property on more reasonable terms.

The COURT.—I don't see the bearing of that testimony in this case. His reliance on the statements that are alleged to have been made to him in Denver at the meeting of the 2d of April could not have been influenced by that; and the offer that he made in San Francisco certainly could not have been influenced by that; and I don't see where his motives subsequent to that date cut any particular figure in this case.

Mr. COOKE.—This particular item here is along about July 1st, it is true, but there is other evidence which showed he had that same motive. We think the evidence shows he had that motive at the time he made that proposition which he claims is an offer of performance.

The COURT.—Well, you can offer that evidence first, but I think I shall sustain the objection to this; or, if you place a great deal of reliance on it, you may offer it, and it will be stricken out on motion. At any rate, with that stipulation, it

would go into the record anyway. It is an equity case, and testimony that is offered remains in the record, if there is any exception taken to its exclusion.

Mr. COOKE.—We next offer in evidence the statement, or the evidence of Mr. Terwilliger, who is connected with Ingersoll-Rand Company of San Francisco, California, one of the creditors of the Nevada Humboldt Tungsten Mines Company, to this effect—and this is under stipulation by counsel that he would so testify if he were here: That on or about the 3d day of June, 1919, at the time when the creditors of the Nevada Humboldt Tungsten Mines Company were called [559—554] into conference in relation to their claims against that concern; that Mr. Terwilliger, the witness, met Mr. David Taylor and Mr. Jackson, his attorney, at the office of Mr. Bayless, the attorney who has testified in this case, in the Crocker Building in San Francisco, and that in that conversation, in the presence of the parties named, Mr. Taylor asked Mr. Terwilliger if he, meaning the Ingersoll-Rand Company, which he represented, would sell him, Taylor, their account against the Nevada Humboldt Tungsten Mines Company, and that before Mr. Terwilliger had time to answer that question, Mr. Jackson interposed, and said, in substance and effect, “Now, David, I would not do that,” and nothing more was said or done in reference to the matter. That is offered for the same reasons and to prove the same matters as I stated

in connection with the other, that at said time he was trying to purchase these accounts.

Mr. THATCHER.—We are willing to admit that if he were here he would so testify, but we don't admit that is the truth; and we further object to the consideration of the facts of those statement, even if they be the truth, on the ground and for the reason that they do not constitute or show any defense on behalf of the defendants in this action, and incompetent, irrelevant and immaterial.

Mr. COOKE.—Well, we think in a suit of this kind the motive of the party is of the highest importance.

(Discussion.)

The COURT.—The Court cannot go behind his motives in exercising a right that was his, and if his acts did not measure up to what he should have done under those conditions, certainly the Court would not listen to him in saying that he intended to fulfill his contract, in the face of the fact that he did not. I do not think I have any right to go behind his motives, if he offers to fulfill his [560—555] contract, nor can I excuse him for a failure to fulfill his contract because his motives were of the very best, and it was a mistake on his part.

Mr. COOKE.—It is in the record to this extent, I take it, that if nothing more is presented to show it is proper, your Honor would simply strike it out and exclude it.

THE COURT.—No, I think I will strike it out now; but you can argue that is an error, and ask me to change my ruling later, if you wish to do so.

MR. COOKE.—Very well.

MR. WHEELER.—Mr. Thatcher, in our answer we allege, and I think it is consistent with your own allegations, that at a meeting which had been called, there were a certain number of shares represented, and they were ready to vote this ratification, and would have voted the ratification but for the temporary restraining order issued by the Court.

MR. THATCHER.—Yes, we will admit they would have taken the step.

MR. WHEELER.—And that the number of shares would have been voted as there indicated.

MR. THATCHER.—And the number of shares so indicated.

THE COURT.—You have admitted that in your pleadings, haven't you?

MR. WHEELER.—We make the allegation affirmatively in our answer; counsel does not make the allegation; he admits our allegation.

So far as I know, that will end our case.

MR. COOKE.—We rest. [561—556]

**Testimony of George B. Thatcher, for Defendants
(In Rebuttal).**

MR. GEORGE B. THATCHER, called in rebuttal as a witness on behalf of defendants:

MR. WHEELER.—We waive the oath. I realize

(Testimony of George B. Thatcher.)

the delicacy in view of the rule of court, and will not put you in the position of testifying; your statement will be entirely agreeable to us. I trust you will accept it in that way, for I realize the embarrassment that attends the argument and presentation of a case by counsel who intends to go under oath.

Mr. THATCHER.—I do not know what the Court's position will be.

The COURT.—It is immaterial to me whether you take the oath; your statement, as far as I am concerned, has just as much weight as if made under oath.

Mr. WHEELER.—All I desire is the privilege of asking some questions.

Mr. THATCHER.—My statement is, then, that Defendants' Exhibit "Z" was prepared by me in Reno during the first week in August, I think on the 8th; it was dictated in my office, and transcribed by a stenographer in the office of Hoyt, Norcross, Thatcher, Woodburn & Henley. The interlineation "W" after "1.75%" and ahead of "03" is in my handwriting. The interlineation "Bonds" above "preferred stock" in the third line from the bottom is in my handwriting. The words "New corporation to be formed immediately, 65% stock to be placed in escrow," are all in my handwriting. This paper was presented to Mr. L. A. Friedman by me, in company with David Taylor, in the office of Judge L. N. French, on the 8th day of August, 1919.

(Testimony of George B. Thatcher.)

Mr. COOKE.—Whose handwriting is at the bottom of that?

Mr. THATCHER.—Mine, Mr. Cooke.

Mr. COOKE.—Three lines at the bottom there, I believe.

Mr. THATCHER.—The three lines at the bottom and the word “Bonds” [562—557] and the “W” are all in my handwriting.

Mr. WHEELER.—So far as the witness has gone, as far as my client is considered, we admit the fact as stated by you.

Mr. THATCHER.—Now with reference to the conversation with Mr. Friedman, I will state that I was in San Francisco for two or three days prior to Thanksgiving, 1919; that I was there on the day after Thanksgiving; that I left on Friday after Thanksgiving, 1919, and went East; that on my way East I took train number 20; that I did not stop at Reno on the way East from San Francisco, but went directly to New York; that I was in New York or Washington or on the train at all times in November and December on and after the 28th day of November; that I argued a case in the Supreme Court of the United States on the 8th day of December, and that about the 4th or 5th of December I was in New York; that I returned from the East and arrived in Reno about the 19th of December, 1919; that I heard Mr. Friedman’s testimony; that Mr. Friedman is mistaken; that I did not have that conversation with Mr. Friedman

(Testimony of George B. Thatcher.)

at that time, or to the best of my recollection at any other time. I think that is all.

Mr. WHEELER.—(Q.) Did you at any time have any conversation with Mr. Friedman, in which the matter of postponing payment of all over and above one thousand dollars under that settlement was discussed? A. With Mr. Friedman?

Q. Yes. A. No, sir.

Q. Was there never any conversation between you at all with regard to when and under what circumstances the second payment should be made?

A. I don't believe there was, Mr. Wheeler.

Q. With whom did you conduct the negotiations, Mr. Thatcher?

A. First with Mr. French—Judge French; they opened with Judge French, and they closed with Mr. L. A. Gibbons. [563—558]

Q. Did you have any conversation wherein the reason for postponing that payment was indicated to you by any person, whether Mr. Friedman or any representative of the defendant corporations, or any of them? A. I did.

Q. What was that conversation?

A. That conversation was with Mr. Gibbons; it took place on the first—about the first of February, or a day or two afterward. I asked Mr. Gibbons if I could have the check for the balance on the Taylor contract or settlement; he then said no, it will have to wait a few days until they get their next payment.

(Testimony of George B. Thatcher.)

Q. Did you understand what payment he then referred to?

A. I think I did understand that.

Q. You did surmise that it was a Loring payment, did you, Mr. Thatcher? A. I think I did.

Q. And so, apart from any question of conversation with Mr. Friedman, the real fact is, it was your best belief at that time, and you suspected that the money that was to be paid was to be paid in by Mr. Loring on account of his contract?

A. That is true at the time of that conversation.

Q. And was in February of 1920? A. Yes, sir.

Q. You had acted as the attorney for the plaintiff in filing a bill in this court in which you had alleged the insolvency of the defendant Nevada Humboldt Tungsten Mines Company, had you not?

A. I have prepared all suits that are on file against the corporation or any of the defendants.

Q. Do you recall the circumstance—I will show you the bill if there is any question in your mind about it—that you had drafted a complaint, and my recollection is that you verified it?

A. I verified the complaint in this action.

Q. In this action? A. Yes, sir. [564—559]

Q. Then I may be in error. Let me get that complaint, if you please. Just examine the bill in that case, and say whether or not you prepared it. (Hands to Mr. Thatcher.) That is case number 2263 in this court. A. Yes, I prepared it.

Q. I call your attention to the paragraphs therein

(Testimony of George B. Thatcher.)

referring to the insolvency of the defendant corporation.

A. Will you call my attention to that?

Mr. COOKE.—Paragraph 9, page 7.

Mr. WHEELER.—Refer to the last page: “That in truth and in fact said corporations and each of them are now insolvent”; and that would be as of the date of filing the complaint, I take it.

A. Yes, sir.

Q. You recall drafting that? A. I do.

Q. And it was a matter at that time within your knowledge and belief that the corporations were insolvent? A. I should not say that.

Q. At any rate you drafted that at a time when you believed the corporations were insolvent?

A. I drafted that at the time stated there.

Q. Did you believe at the time that you drafted that that the corporations were insolvent, apart from the Loring contract

A. I had made no investigation of my own accord as to the solvency or insolvency of the corporations; I had been informed as to the amount of the debts of the company; I did not know the value of their property or assets; their debts, or at least according to my information, were some place between a hundred and fifty and two hundred and twenty thousand dollars.

Q. Calling your attention further to the allegations of the complaint, the value of the assets of the corporation as therein alleged—let me say, Mr. Thatcher, that it is not in any way for [565—

(Testimony of George B. Thatcher.)

560] the purpose of contradicting you personally.

A. Not at all.

Q. Let me ask Mr. Jackson, perhaps that would be the best way to bring it about: Can it not stand here admitted without further questioning Mr. Thatcher, which I do not desire, that it was known to David Taylor at the time this payment was accepted by him, the first payment of a thousand dollars, and also the second payment, that the properties and assets, with certain minor exceptions, of the defendant Nevada Humboldt Tungsten Mines Company, had been by agreement transferred to Mr. Loring, and that the sole and only assets of the corporation were at the time that he accepted those moneys, the payments to become due under the Loring contract?

Mr. THATCHER.—Well, my understanding at that time was that there had not been—I don't know what to do, whether to go down there or stay up here—my understanding of the situation was this: it was our contention at that time that no valid contract had been entered into; that the sale of the corporate assets by the stockholders, without a meeting called in accordance with the terms of the statute, was invalid. Now it is my statement that the contract was either invalid and therefore the corporation entitled to its property, or it owned the assets of the contract with Mr. Loring.

Mr. WHEELER.—(Q.) At the time that the payments were made, however, you did know that

(Testimony of George B. Thatcher.)

the corporation had passed over the possession and control of its properties to Mr. Loring?

A. I did.

Q. And you also knew and also understood and believed at the time that you had Mr. Taylor verify that complaint that there were no other assets in the corporation which would bring money under the conditions then existing, than the Loring contract?

A. Now, let me see—give me that paper, please. (A paper is [566—561] handed to Mr. Thatcher.) My recollection of the situation is this; that when this bill of complaint at law, number 2263, was filed, the only information I had, or that Mr. Taylor had, with reference to the Loring contract was Mr. Loring's telegram, in which he said, or this is the substance of it: I have option on Nevada Humboldt, I think it is, or whatever it may be; the telegram has been offered in evidence, and is of date the 11th of August. After the receipt of that telegram I asked Judge French, I believe, to give me a copy of the proceedings of stockholders and directors which authorized that contract; I don't recollect exactly when I received that, but it was before the institution and filing of the suit, B-1.

Q. You sent this complaint on to Mr. Taylor in its present form, expecting him to verify it?

A. No, Mr. Taylor was in Reno, and my recollection is that he verified it in Reno.

(Testimony of George B. Thatcher.)

Q. At any rate, when you drafted it you expected of course, that he would verify it?

A. I drafted it, and I think it was dictated in his presence.

Q. Then at the time you accepted the payment of a thousand dollars and at the time you accepted the payment of upwards of six thousand dollars for Mr. Taylor, did you not in fact believe and expect that the money to be paid thereunder would come from moneys paid in by Mr. Loring?

A. I had no beliefs or expectations in that regard; I did know at all times, after some time in September when they furnished me records of the proceedings, all of the terms and conditions of the Loring contract and papers.

Q. But, Mr. Thatcher, I understood you a moment ago, that you had a talk with Judge Gibbons, in which mention was made of the next payment, and that you understood that was to be a payment under the Loring [567—562] contract, and that that had reference to conversation prior to the payment of the six thousand dollars?

A. That conversation took place on about the first or second, or sometime after the first of February.

Q. That was prior, however, to the six thousand dollar payment, wasn't it?

A. A day or two prior.

Q. So that in accepting the six thousand dollar payment you did really understand that the source of the money was Mr. Loring?

(Testimony of George B. Thatcher.)

A. I had no such understanding or knew what the facts were.

Q. You knew that Mr. Loring had made the contract, and its terms? A. Yes, sir.

Q. You did not know of any other source from which the defendant corporations were obtaining money, did you? A. No.

Q. Did the idea at that time never occur to you as representing Mr. Taylor, that the source of the money you were receiving was W. J. Loring?

A. Did it occur to me?

Q. Yes.

A. Oh, I would not say what my mental processes at that time were. I will say this, Mr. Wheeler, at all times I knew of the Loring contract, I don't believe I am any different from any one else, and when I obtain information it usually stays with me, but what my mental processes were at that time, I cannot say.

Q. At any rate, when Judge Gibbons, a day or two before you received the six thousand dollars, made the statement to you that he did, you understood him as indicating to you that the source of that next payment, to wit: the six thousand and odd dollars, would be money received from Mr. Loring? A. No doubt of it.

Mr. WHEELER.—That is all. [568—563]

Testimony of David Taylor, for Plaintiff (In Rebuttal).

Mr. DAVID TAYLOR, the plaintiff, called in rebuttal, testified as follows:

Mr. THATCHER.—I am a little doubtful about some of these questions, if the Court please, and I don't want to take up the time if there is a straight conflict, but there are so many conversations here, and we may make headway on it.

Q. Mr. Taylor, you were present at the meetings in San Francisco which have been testified to here?

A. I was.

Q. At any of those meetings, after Mr. Jackson made a statement as to the representations, did Mr. Murrish or Mr. Nenzel or Mr. Poole at any time get up in those meetings, and state that they didn't wish or want it understood that their silence constituted an acquiescence in any of the statements of Mr. Jackson? A. They did not.

Q. They did not in your presence at any time?

A. No, sir.

Q. Mr. Taylor, did you in New York at any time in a conversation with Mr. Poole, say that you would not advance any more money on concentrates until you had received Mr. Bancroft's report?

Mr. COOKE.—Object to that as not sur-rebuttal; the witness was interrogated in regard to that, and he stated that he did not recall any such conversation.

(Testimony of David Taylor.)

Mr. THATCHER.—Now having heard Mr. Poole's testimony, I want to know if he had that conversation?

The COURT.—I will let him answer.

(The reporter reads the question.)

A. I did not.

Mr. COOKE.—I suggest to counsel that is not the testimony of Mr. Poole—Bancroft's report and further examination of the mine, as I recall. [569—564]

Mr. THATCHER.—(Q.) In New York had you a conversation with Mr. Poole, and did you state to Mr. Poole that you would not advance any more money on concentrates until there had been an examination or a report, or a further examination or report made by Mr. Bancroft? A. I did not.

Q. Did you so state to Mr. Poole in substance and effect? A. I did not.

Q. What are concentrates, Mr. Taylor?

A. The products produced from the ores at the mill.

Q. After they have been mined? A. Yes.

Q. Mr. Taylor, did you in Denver on the 30th day of March, the 31st day of March, and the first of April or the 2d of April, at any time state to Mr. Poole, Mr. Murrish or Mr. Nenzel, or any of them, that you intended to rely on Bancroft's report, and that you didn't care what the pannings were, or reported by Mr. Morrin? A. I did not.

Q. Did you at any time in any of the meetings that you had in Denver with the defendants Poole,

(Testimony of David Taylor.)

Murrish and Nenzel, state that you intended to rely on Bancroft, and that you would not rely upon any statements made or other matters shown to you on those occasions? A. I did not.

Q. Mr. Taylor, did you in Lovelock have a conversation with Mr. Poole in which Mr. Poole said, "Taylor, I don't think you have got the money to go through with this deal, I think you are lying about it"? A. I did not.

Q. Was such statement in substance or effect, made to you by Mr. Poole at any time in Lovelock on or about the 30th of May, 1919? A. No.

Q. Or on the 31st? A. No.

Q. Or at any time that you were at Lovelock on or about that time? [570—565] A. No.

Q. Mr. Taylor, were any maps prepared by you and Mr. Poole in Denver between the 30th day of March and the 2d day of April, both inclusive, 1919, except the one which has been introduced here, offered in evidence, and is plate 5 annexed to Exhibit 15, Bancroft's report?

A. No, sir, there was not.

Q. Did Mr. Poole in Denver on the 2d day of April, or at any other time on his trip to Denver, say to you that those figures, referring to the mine map, were mere estimates which had been placed on that map by John Huntington, who was a mining engineer who had brought this map up to date, and that Huntington had got that information from Mr. Morrin, who was the superintendent, and Mr. Morrin had arrived at those values by panning at

(Testimony of David Taylor.)

the mine, and that you knew as well as he did that panning was a very unreliable way of arriving at the value of ore; did you have such a conversation?

A. I did not.

Q. Did you have such conversation at that time, or any other time on that occasion, in substance and effect? A. No, sir.

Q. Mr. Taylor, at the meeting at Denver, on the morning of the 2d day of April, did Mr. Poole call your attention to the fact that the date on the map which he had brought back there, did not enable any one to calculate tonnages of ore, that it was sufficient to calculate tonnage, but that the tonnage was not necessarily ore, and did you then say, "That does not make any difference, what I want to do is to get sufficient data to present to Mr. Bancroft to show him that there has been enough additional development work done there since the last visit to warrant going again, and I want to use that to urge him, as I have been urging him to go, and he does not want to go, and I want to use this to urge Mr. Bancroft to go there again"; did you have such a conversation?

A. I did not. [571—566]

Q. Did you have it in substance or effect, on any of those occasions? A. No.

Q. I call your attention to a telegram on a Western Union Telegraph blank—have you the original of that telegram?

Mr. COOKE.—What date is it?

Mr. THATCHER.—March 28th, addressed to Nev-

(Testimony of David Taylor.)

ada Humboldt Tungsten Mines Company, signed David Taylor.

Mr. COOKE.—We have no objection to your using that copy, if it is otherwise competent.

Mr. THATCHER.—(Q.) Did you send that telegram? A. I did.

Mr. THATCHER.—We offer it in evidence, if the Court please.

Mr. WHEELER.—A letter of substantially the same date is already in.

Mr. COOKE.—We object to this as incompetent, and not rebuttal of anything brought out by the defendants.

Mr. THATCHER.—Rebuttal of the statement he was going to urge Mr. Bancroft to go to the property, and Mr. Poole's statement that he wanted the data for the purpose of urging Bancroft again to go to the property.

The COURT.—I don't believe that is in rebuttal of anything defendants have offered, but you have a pretty big record anyway, and I guess you may just as well have it in.

(Telegram from David Taylor to Nevada Humboldt Tungsten Mines Company, dated March 28, 1919, is marked Plaintiff's Exhibit No. 52.)

Mr. WHEELER.—I think Mr. Cooke in behalf of his client made the objection that it was not in rebuttal? I understood you so, Mr. Cooke.

Mr. COOKE.—Yes.

Mr. THATCHER.—That is all.

Mr. WHEELER.—No questions. [572—567]

Testimony of John G. Jackson, for Plaintiff (In Rebuttal).

Mr. JOHN G. JACKSON, called in rebuttal, testified as follows:

Mr. THATCHER.—(Q.) Mr. Jackson, you met Mr. Taylor in Lovelock, on or about the 30th or 31st day of May, 1919?

A. I did, May 31st.

Q. Were you present at conversations between him and Mr. Poole? A. I was.

Q. Were you present at the conversations which led up to the trip to the mine? A. Yes, sir.

Q. In those conversations do you recollect whether or not at any time Mr. Poole said in substance and effect to Mr. Taylor; "Taylor, you are lying, I don't think you have the money to go through with the deal"? A. He did not say that.

Q. Was anything of that kind said at all at that time? A. Nothing of that kind was said.

Q. Mr. Jackson at any time at the meetings that you had in San Francisco did Mr. Poole or Mr. Nenzel get up in the meetings and say to you or to the meeting that they didn't wish their silence to be deemed or taken as acquiescence in your statements as to the representations that had been made? A. No, sir.

Q. Did Mr. Murrish in any of the meetings so state to you?

A. Mr. Murrish did not so state in any of the meetings.

Q. Did he at any time so state?

(Testimony of John G. Jackson.)

A. He did; he took me apart one day I think it was along about Wednesday or Thursday and stated that he did not wish to be understood as acquiescing in the statements of fact in regard to the condition of the mine that I had made to them at the meeting on Monday. That is my best recollection of what he said.

Q. Did Mr. Murrish on Friday or any other day at those meetings, say to you or to Mr. Taylor that he didn't have any changes to make [573—568] to the contract, and that he wanted the proposition to be put to the creditors wholly as Taylor's proposition?

A. I have no recollection of such a statement by Mr. Murrish.

Q. Do you know whether he did or did not?

A. I feel very sure he did not make such a statement.

Q. At any rate, you have no recollection of that?

A. None whatsoever; my recollection is quite distinct the other way.

(By direction the reporter reads the last three questions and answers.)

WITNESS.—That is by Mr. Murrish directly to me, sir.

Mr. THATCHER.—(Q.) I call your attention to Defendants' Exhibit "Z," and ask you when you first saw that?

A. I first saw Defendants' Exhibit "Z" in the courtroom yesterday.

(Testimony of John G. Jackson.)

Q. Was that paper prepared by you or used by you at any time in San Francisco at the meetings which you have testified here that you had between yourself and Mr. Taylor and Mr. Bayless and the defendants, Nenzel, Poole, Murrish and Jones?

A. It was not.

Mr. THATCHER.—That is all.

Cross-examination.

Mr. WHEELER.—(Q.) Was there any paper other than the paper just examined by you, and other than the draft of contract and the addenda thereto, used in the course of those proceedings by you?

Mr. THATCHER.—Objected to as not cross-examination.

Mr. WHEELER.—I submit it is strictly cross-examination.

The COURT.—I will allow the question.

A. I have no recollection of any paper at all, Mr. Wheeler; I would not undertake to say that I did not during the conversation make notes on a pad or a piece of paper as to the terms of the agreement; there was certainly no typewritten paper at that time. [574—569]

Q. But you are not prepared to say that there was not an additional paper upon which the figures were presented to these gentlemen and the terms set down prior to your drafting the proposed form of contract?

A. Oh, yes, I am prepared to say there was no

(Testimony of John G. Jackson.)

such paper prepared and presented to them.

Q. Was there no paper prepared or used in your dealings with them; did you not read from some paper? A. No, Mr. Wheeler.

Q. Did you not refer to some paper in the course of the negotiations? No, sir.

Q. Did you not have notes before you from which you made statements in the course of that meeting?

A. The most that I can say is that it is not unlikely, as it is a habit of mine to make notes during the conversation of matters which seem of consequence, and which were to be embodied in the contract to be drawn.

Q. You were proposing to those gentlemen rather an elaborate scheme of reorganization, a corporation with preferred stock, with numbers of shares, and with terms and conditions of advancing money, were you not? A. Yes, sir.

Q. Were you stating that out of your head, or were you stating that from some memorandum upon which you and Mr. Taylor had carefully laid down the plan?

A. It was not stated from any memorandum which Mr. Taylor and I had prepared.

Q. You had discussed with Mr. Taylor before you entered your first meeting, had you not, the terms which he was prepared to make?

A. Yes, sir.

Q. And you had some memorandum setting forth those terms, which you presented to those gentlemen, did you not? A. No, sir.

(Testimony of John G. Jackson.)

Mr. THATCHER.—Object as not cross-examination, if the Court please. [575—570]

The COURT.—I will allow the question.

Mr. WHEELER.—(Q.) Did you then recite the capitalization, the amount to be advanced, the terms upon which it would be advanced, from your memory and not from some memorandum that you then had?

A. It was entirely from memory, Mr. Wheeler, or else developed during the course of the conference, and then put down, as I say, possibly on a piece of paper at that time.

Q. I understood you a moment ago that it was your habit to make notes, and to speak therefrom?

A. No, not to speak therefrom.

Q. And you thought it was quite possible that on that occasion you had such notes before you?

A. No, I think you misapprehended me, or else I did not express myself clearly, Mr. Wheeler. I said it was my habit to make notes during a conference of that kind concerning the points that were agreed upon as the conference progressed; and I very likely had such a paper before me at that time.

Q. Then as from your head you brought forward the terms which you were proposing on behalf of your client going into the organization of the corporation, its capitalization, its stock, its preferred stock, the loans that were to be made, the method of securing them, did you not set those items down upon some paper?

A. As I say, I have no particular recollection of

(Testimony of John G. Jackson.)

that, but I would not want to say now that I did not make notes during the conferences as I went along.

Q. It would be in accordance with your habit to do it, would it not?

A. Quite so; that would be in my own handwriting of course.

Q. And in order that you might have before you a recollection of the precise terms that you had proposed? A. Yes, sir. [576—571]

Q. Is it not also possible that on the occasion you showed to Mr. Murrish, or discussed with Mr. Murrish, the terms upon which you proposed to draw up the contract, and showed him, or discussed with him, with your paper before you, those terms?

A. It is possible.

Q. Examine the exhibit in question, Exhibit "Z," and state whether or not there is anything in that document that differs materially or substantially from the suggestions that were made at that first meeting, which you say probably were jotted down by you, and which may have been exhibited on that occasion after being so jotted down, to Mr. Murrish?

A. I think I used the word "possibly," Mr. Wheeler, not "probably."

Q. "Possibly," I stand corrected. (Witness examines Exhibit "Z.")

A. Yes, there are some very material differences in this paper. Shall I point them out?

(Testimony of John G. Jackson.)

Q. I think perhaps it would be well enough for you to do it, yes.

A. In the first paragraph this paper states that the estimated debt of the company is from one hundred and thirty to one hundred and forty thousand dollars, exclusive of that owed to Mr. Taylor. In San Francisco we were figuring on \$150,000, or upwards, certainly not less than \$145,000. Here is a provision that Mr. Taylor will advance \$37,500 for each 10,000 tons of additional ore blocked out from new developments. That was not discussed in San Francisco. There is a provision here that new ore blocked out under this contract shall be determined from time to time by the report of Howland Bancroft, mining engineer; no such provision as that was discussed in San Francisco.

Q. I notice in the contract as drafted by you there was a provision that Mr. Bancroft was to be the consulting engineer?

A. I think it was Mr. Thane; I have not looked at it recently, [577—572] but that is my recollection.

Mr. WHEELER.—Look at that, and see which is right, Mr. Cooke; I may be wrong.

WITNESS.—Also a provision in this paper that Mr. Taylor when all the debts of the corporation are paid shall receive 65 per cent of the stock of the corporation to be organized; the instrument in San Francisco was predicated on Mr. Taylor receiving 62 per cent and 38 per cent remaining with the former stockholders.

(Testimony of John G. Jackson.)

Mr. COOKE.—The only thing I find here, Mr. Wheeler, is B. L. Thane, managing director in charge of operations.

WITNESS.—Is that sufficient?

Mr. WHEELER.—Yes, I think so. No mention of Mr. Bancroft's name?

Mr. COOKE.—No mention of Mr. Bancroft.

Mr. WHEELER.—I stand corrected. (Q.) Now with reference to the document Exhibit "Z"; while there are the differences you pointed out, the fact is that none of these terms were ever embodied into the proposed agreement that you made in San Francisco, were they?

A. None of those terms?

Q. Yes. A. In that agreement?

Q. Yes.

A. Well, Mr. Wheeler, I have not read that agreement for over a year; my recollection is that that agreement drawn in San Francisco provided for an issuance of bonds, of which Mr. Taylor was to buy \$85,000 worth at ninety-five; those bonds were to be secured by a lien on the ore blocked out, as certified by Mr. Bancroft's report.

Q. You are now talking—

A. (Intg.) Of the San Francisco agreement, which is in evidence.

Q. There is, then, a reference to Mr. Bancroft in that agreement.

A. No, I am just trying to describe the security; I don't think [578—573] Mr. Bancroft is men-

(Testimony of John G. Jackson.)

tioned by name in the agreement; that is easily susceptible of verification.

Q. Without going into that, there seems to be a difference between Mr. Murrish, yourself and Mr. Thatcher as to one document that was used in San Francisco, and Mr. Murrish has given his recollection. I call your attention to the fact that in this document which Mr. Murrish has told us he believes was used in San Francisco, the following appears: "Mr. Taylor will advance \$85,000, \$75,000 to be paid to the creditors *pro rata*, and \$10,000 to be used as working capital for the development of the mine." That was mentioned in your first negotiation in San Francisco with Mr. Murrish?

A. Yes, sir.

Q. So there is that similarity. Was this provision not also there: "The \$85,000 is to be paid back to Mr. Taylor from ore already in sight and developed in the mine, to be mined and milled at such time as Mr. Taylor may deem best"; was not that discussed in the San Francisco negotiations?

A. Something along those lines. The discussion in San Francisco was different, and the agreement drawn in San Francisco was different from that, according to my recollection.

Q. At any rate, there are points of resemblance and points of difference?

A. Certainly, but there is no possible foundation between the two papers.

Q. You expected that Mr. Murrish might draft

(Testimony of John G. Jackson.)

this contract in San Francisco, didn't you?

A. I hoped he would before I was given the work of doing it.

Q. After a discussion of the terms proposed by you, you made the suggestion that Mr. Murrish should draft the document, didn't you?

A. That is my recollection, yes, sir.

Q. Now you didn't make that suggestion to Mr. Murrish without [579—574] having some memorandum from which he could draft and elaborate a document of the character required by such a proposal as you had made, did you? A. Yes.

Q. That he would draft it out of his head without reference to any memorandum.

A. No, sir, it was immediately settled that Mr. Murrish would not do it.

Q. You are not sure, at any rate, that you did not with Mr. Murrish go over a memorandum of your own, setting down Mr Taylor's proposed terms?

A. Yes, sir, I am sure I didn't.

Mr. WHEELER.—That is all.

By Mr. COOKE.—(Q.) Do you know what happened the memorandum that you used at that time, Mr. Jackson?

A. My recollection is quite distinct, Mr. Cooke, that immediately after this meeting, or rather the next day after this meeting, which was, if I recollect correctly, Thursday afternoon—I didn't work Thursday night—Friday morning I started to work on this contract, and I wrote it all in long hand, first prepared a skeleton, and any memorandum

(Testimony of John G. Jackson.)

that I might have had, if I did have any, and I have no recollection of having any, would be taken by me as a working paper for the preparation of the contract, and I would not have left it, naturally, with anyone else.

Q. Then you don't know where it is now; if you did have one you don't know what became of it?

A. No, I don't know what became of it, it would be a pencil memorandum only, it would not be type-written.

Q. Do you remember whether the memorandum was on yellow or on white paper?

A. No, I have no recollection of making a memorandum.

Q. You are not sure, as a matter of fact, whether you made any at all. A. No, I don't think I did.
[580—575]

Q. When you retired to formulate a draft in lead pencil, do you remember whether you had any data of any kind from which you formulated the paper which was afterwards typed?

A. Yes, I had a certain amount of data that I had gathered together in Lovelock, and other information which I had gathered in the course of conversations.

Q. What I had reference to was data which you gathered at this meeting, any notes jotted down which assisted you in making this copy?

A. No, my recollection is I had no such memoranda, and made none; I had a habit of doing it,

(Testimony of John G. Jackson.)

and that is the reason I, unfortunately perhaps, said I might have done it.

Q. Do you know where the lead pencil draft is which was afterwards copied and typed?

A. That was destroyed; that was given to the hotel stenographer to copy from, compared, and destroyed.

Q. Were there any changes made from the lead pencil copy to the typewritten copy by the hotel stenographer, or was it copied just as you handed it in the lead pencil notes?

A. Oh, I think it was copied exactly.

Q. You didn't use it in dictating, just handed it to her and she copied it?

A. That is it; she copied it, as I recollect, directly from my long hand copy of the contract.

Mr. COOKE.—No further questions.

Mr. WHEELER.—(Q.) You stated on your direct examination that you did not hear Mr. Poole say to Mr. Taylor at Lovelock, anything in substance or effect, that he, Taylor, had lied, and that he, Poole, did not believe that he, Taylor, had the money with which to complete his contract. Did you ever hear that statement made to Mr. Taylor by Mr. Poole at any other time or place?

A. No, sir.

Q. Or any part of it? A. No, sir.

Mr. WHEELER.—That is all.

Mr. THATCHER.—That is all. [581—576]

(A short recess is taken at this time.)

Mr. THATCHER.—If the Court please, I would like to offer in evidence and have the Court consider all of the stipulations extending time in case B-1, David Taylor vs. Nevada Humboldt Tungsten Mines Company and W. J. Loring; also all stipulations extending time in case 2263 at law, entitled David Taylor vs. C. W. Poole, et al.

Mr. WHEELER.—Objected to as irrelevant, immaterial and incompetent as far as the defendant Loring is concerned.

Mr. THATCHER.—It is offered particularly for the purpose of rebutting the defense, or proposed defense, of laches in prosecuting our various suits.

Mr. COOKE.—I think the exhibit offered by us, the complaint more particularly we offered, and our case on that, would go to laches, down to the time of commencing the suit, not to the prosecution of it afterwards. I have no serious objection to the stipulations, but if they are to go in, it seems to me it would be only fair for counsel to admit at the same time, the extraordinary conditions that existed at that time with reference to Mr. Gibbons' illness, and inability to handle the case, and that he was the attorney in charge of the case, and that was the reason for its being deferred by these various stipulations; that it was no disposition on the part of the defendants to postpone the case; it was due to this condition that I have mentioned, that Mr. Gibbons had charge

of the case for the firm of Gibbons, French & Stoddard, but owing to his continued illness, which finally resulted fatally, these stipulations were consented to by counsel for the plaintiff, I think most of them at the request of Mr. Gibbons' firm.

Mr. THATCHER.—That is true; Mr. Gibbons was sick, and I extended the time for him; the firm was Gibbons, French & Stoddard; they stated to me Mr. Gibbons was ill and had not been able to take [582—577] care of these matters, and I extended the time. The record will also show, however, that I extended the time for Mr. Davis or Mr. Loring, at their request, to answer in one of the suits—B-1.

The COURT.—Why not stipulate, instead of introducing those?

Mr. THATCHER.—I would rather stipulate, and prepare a statement and it can be incorporated in the record as to what the stipulations were.

Mr. WHEELER.—So far as the defendant Loring is concerned, our objection would be deeper than that. In the present action, the one we are trying, the bill was filed on the 7th day of April, 1920, and the period from the execution of Mr. Loring's contract and the time that the knowledge of that contract was brought home to the plaintiff, as appears by these notices of a meeting held on the 26th day of August, 1919, from that time forward to the time of the filing of this bill would be the period which would designate the laches

on which we rely; and stipulation that might have been entered into in an action at law would cut no figure as a defense to a suit where laches are claimed, or in mitigation of, or as a defense to laches, where it appears that the particular bill in question was not filed until April of the present year.

Mr. COOKE.—There are two stipulations in this particular case extending the time. I think the defendants all promptly answered in this case now on trial.

Mr. WHEELER.—The filing of the bill again would be the important thing.

The COURT.—I don't really see the materiality of that testimony. The stipulations were not filed until after the commencement of the suit.

Mr. COOKE.—We are not complaining about the action at law; the laches we are depending on is the delay in commencing this particular case on trial. The stipulation in the action at law [583—578] and the time allowed there, would have no bearing here; the point of our objection being that it is irrelevant and incompetent. If the stipulations had been had in this case it might be different.

Mr. WHEELER.—It made no difference in this case, the date of the filing of the bill is the important thing here.

Mr. THATCHER.—I won't encumber the record. May it be understood that the stipulations were entered into at the request of the defendant or de-

fendants in these cases, extending the time to answer up to the times when the respective answers were filed, and that these stipulations were made and given at the request of the defendants?

Mr. COOKE.—What case are you talking about, Mr. Thatcher?

Mr. THATCHER.—B-1 and 2263.

Mr. COOKE.—So far as the defendants represented by myself are concerned, I will take counsel's word for it that these stipulations were obtained as he states at the suggestion of Mr. Gibbons, who then had charge of the case; but we specifically object to the admissibility of these stipulations as having any bearing on the question of laches pleaded as a defense in this action, because they pertain to an entirely different action, which is brought in here simply by the pleadings incorporated as a part of the exhibits in this case; any laches that may have existed in the other case is in no wise material here. I cannot possibly see what relevancy laches in some other case might have, or something tending to show there was no laches in some other case, would have with reference to laches in this case.

(Discussion.)

The COURT.—I think you are entitled to put that evidence in the record, not as to what occurred since this suit was brought, but what occurred prior to the beginning of this suit, as showing that you were trying to do something. [584—579]

Mr. THATCHER.—Proceeding with some rea-

sonable degree of diligence, and asserting our various rights.

The COURT.—Well, I will let you put that in.

Mr. WHEELER.—Then I would like to offer in that connection, and ask counsel to admit the fact, that no steps whatever were taken against the defendant W. J. Loring, and the defendant Nevada Humboldt Tungsten Mines Company—that is a suit to cancel and annul the deed and contract, no service was made or attempted, and no order of publication obtained on Mr. Loring, Mr. Loring's appearance was a voluntary one.

Mr. THATCHER.—I would like to have the record show Mr. Loring's appearance was not a voluntary one, that this Court made an order.

Mr. WHEELER.—I am mistaken as to the number, the number is the present case; in the present case our appearance was voluntary.

Mr. THATCHER.—I cannot agree with you on that. I made no point that you answered when you did, or how you answered; I think in the present case as to when the answer was filed is immaterial.

Mr. DAVIS.—In the present case we were never served with process, or ordered to appear; and on the order to show cause we appeared specially by permission of the Court.

Mr. WHEELER.—That is a matter that is immaterial; however, unless your Honor has ruled, I think our objection should be stated. On behalf of Mr. Loring, we object to these stipulations on the ground they are incompetent, irrelevant and im-

material, that they are in cases other than this present action, in which the plea of laches is put forward; and stipulations in other actions than an action for specific performance to obtain this stock, is directly incompetent, irrelevant and immaterial to any issue in the case as between plaintiff and the defendant Loring.

The COURT.—Well, go on with your testimony. [585—580]

Mr. THATCHER.—I offer in evidence Exhibit 51 for identification. That is a letter from Mr. Loring's office to Mr. Bancroft, a declaration against interest.

Mr. WHEELER.—To what issue is it addressed?

Mr. THATCHER.—Addressed to the issue in which he states he had all of the assets of the Nevada Humboldt Tungsten Mines Company.

Mr. WHEELER.—Objected to as incompetent, irrelevant and immaterial, and would not prove or tend to prove that circumstance. The assets that were purchased appear from the bill of sale and the deeds already in evidence.

The COURT.—This letter was written, was it not, subsequent to the execution of the option in August, the 16th of August?

Mr. THATCHER.—Yes.

The COURT.—And this letter is written September 25th. I don't see the relevancy.

Mr. THATCHER.—My idea is it is the interpretation placed by defendant Loring upon the purchase that he made at that time, and his view that

he had purchased all of the assets of the Nevada Humboldt Tungsten Mines Company, and there seems to be some dispute as to whether he did or not.

The COURT.—I think in the present state of the record I cannot conclude otherwise than that the bill of sale, and the deed that was executed are correct.

Mr. COOKE.—On behalf of the other defendants we object to it as hearsay, and not binding upon us.

The COURT.—I think I will exclude this. I don't see where it will do you any particular good, Mr. Thatcher.

Mr. THATCHER.—That is all, if the Court please.

Mr. WHEELER.—We are waiting for a paper from Mr. Goodin.

Mr. THATCHER.—It can be stipulated that the paper Mr. Goodin [586—581] sends will be received in evidence as if he were here and identified it; it may go in, and if it should be that I desire to make inquiry with reference to it, I shall so notify counsel.

Mr. WHEELER.—I was going to suggest instead of waiting for the paper, we stipulate that of the money paid in by Mr. Loring, a certain proportion was used to pay the debts of each of the defendant corporations.

Mr. THATCHER.—I don't think there is any question about it. Just give me the exact facts.

Mr. WHEELER.—The precise amount paid on

the debts of each I think will not be of assistance to the Court in any way; it was used to pay the debts of the three different corporations; I can't see any possible advantage to either of us in showing the precise amount, so long as we know all of the debts of each of the corporations were paid.

The COURT.—How about the record in those suits?

Mr. THATCHER.—The record in what suits?

The COURT.—That there was so much discussion about a while ago. I told you I would admit all of the record showing the delays prior to the commencement of this suit.

Mr. THATCHER.—That is what I would like. They are here, I designated them.

The COURT.—I think they were not offered; I don't so understand it.

Mr. THATCHER.—I thought I had.

The COURT.—Of course that testimony is admitted for what it is worth. If Mr. Loring had not served at that time, that is perhaps another matter, but on the question of laches, it seems to me they have a right to show what they were doing prior to the commencement of this suit, but nothing subsequent.

Mr. WHEELER.—My point would be unless they were doing something [587—582] toward getting this 62 per cent of stock, it could have no possible bearing upon any defense they might make to the charge of laches.

The COURT.—Well, I don't intend to decide

that now. There are a good many things to be discussed when the question of laches is raised.

(Discussion.)

Mr. THATCHER.—I offer in evidence all stipulations, and ask counsel to consider that they have been read, extending time for the defendants to plead or answer in case number 2263 in this court.

Mr. COOKE.—With the understanding we had a moment ago, I am willing to stipulate in so far as the stipulations we are parties to; I refer to the matter of the illness of Mr. Gibbons, and the reasons that moved the defendants to ask for these stipulations.

The COURT.—I don't really see where these are going to help you very much; it is what you did that would show whether you were guilty of laches or not; the fact that you granted them delays in the trial of that suit, don't show either that you were guilty or not guilty of laches.

Mr. COOKE.—We don't make any point that they are guilty of laches so far as that case is concerned.

The COURT.—Everything you did prior to the commencement of this suit, which indicates that you were waiting to see what the result would be at the mine before you brought the suit, would have quite a bearing, as I look at the matter now.

Mr. THATCHER.—Well, I will call Mr. Loring to the witness-stand. [588—583]

Testimony of W. J. Loring, for Plaintiff.

Mr. W. J. LORING, called for further examination, testified as follows:

Mr. THATCHER.—(Q.) Since you entered into the contract—

Mr. COOKE.—Is he now testifying as your witness, Mr. Thatcher?

Mr THATCHER.—Yes, he is my witness.

Q. Since you entered into the contract of August 16, 1919, under which you entered possession of the mines and property of the Nevada Humboldt Tungsten Mines Company, has the property been operated by you?

Mr. WHEELER.—Objected to as immaterial, irrelevant and incompetent, and not rebuttal.

Mr. THATCHER.—I merely want to show by this witness that the mines have never been operated since the date he made the contract.

Mr. COOKE.—What is that rebuttal of?

Mr. THATCHER.—The question of laches.

The COURT.—I will allow the question.

A. We have kept the water out of the mine, and kept a watchman on it; we have done no mining.

Mr. THATCHER.—That is all.

Mr. WHEELER.—(Q.) That is, from the date upon which the contract of the 16th day of August was made, is it? A. Yes.

Mr. WHEELER.—That is all. [589—584]

Testimony of B. H. Morrin, for Plaintiff.

Mr. B. H. MORRIN, called as a witness by plaintiff, after being sworn, testified as follows:

Mr. THATCHER.—(Q.) Mr. Morrin, do you know when the Nevada Humboldt Tungsten Mines Company ceased operating its property?

Mr. WHEELER.—Same objection, incompetent, irrelevant and immaterial, not rebuttal.

The COURT.—Same ruling.

A. I think it was along about the 16th of August, if I remember right; I don't remember the exact date.

Mr. COOKE.—You mean 1919, I suppose?

A. Yes.

Mr. THATCHER.—That is all.

Mr. THATCHER.—I don't know what bearing the stipulations will have when we come to the argument; I want to offer all of the stipulations extending their time in cases B-1 and number 2263. Should it appear upon the argument of the case upon the merits that they are proper to be considered by your Honor, and should I be able to convince your Honor in reply to their defense that they should properly be considered, they can be considered, otherwise they can be stricken from the record.

The COURT.—They may be marked as having been offered.

Mr. THATCHER.—Stipulations extending time to appear and answer; no other stipulations are offered. We rest, if the Court please. [590—585]

